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SUPREME COURT OF THE UNITED STATES

October Term 1995

ROBERT E. GERTZ,

Petitioner,

V.

ANNE ARUNDEL COUNTY, MARYLAND,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a citizen's substantive due process rights under the Fourteenth Amendment are violated and, therefore, 42 USCA § 1983 is applicable where a County, under guise of police power, enforces an "emergency" zoning ordinance through injunctive action that temporarily deprives that citizen of a vested use of property which the County had specifically permitted for a number of years pursuant to a prior Consent Agreement.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Authorities	iii
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provisions, Statutes, and Ordinances Involved	2
Statement of Case	4
Reasons for Granting Writ	9
Conclusion	23

Appendix:

A. Opinion of the Court of Appeals of Maryland	A.1
B. Opinion of the Court of Special Appeals of Maryland	A.21
C. Judgment of Judge Bruce C. Williams, Circuit Court for Anne Arundel County, Maryland	A.33
D. Opinion and Order of Judge Warren B. Duckett, Jr., Circuit Court for Anne Arundel County, Maryland	A.38
E. Order of Judge Eugene M. Lerner Modifying Injunction, Circuit Court for Anne Arundel County, Maryland	A.44
F. Interlocutory Injunction of Judge Eugene M. Lerner, Circuit Court for Anne Arundel County, Maryland	A.46
G. Ex Parte Injunction, Circuit Court for Anne Arundel County, Maryland	A.48
H. Opinion of Judge Martin A. Wolff, Circuit Court for Anne Arundel County, Maryland	A.50

I. Bill No. 28-90, April 23, 1990, County Council for Anne Arundel County, Maryland A.58
J. 1985 Consent Agreement A.71
K. 1988 Contract A.74
L. Letter of June 4, 1990 . . . . A.85

TABLE OF AUTHORITIES

CASES

Pages

Biser v. Town of Bel Air, Maryland, 778 F. Supp. 249, aff. 991 F.2d 100, cert. den. 114 S.Ct. 182, 126 L.E.2d 141 (1993) 9, 10, 11, 12, 13, 16

Browning - Ferris Industries of St. Louis, Inc. v. City of Maryland Heights, Missouri, 747 F.Supp. 1340 (1990) 22

Collins v. City of Harker Heights, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) 17

Colwell v. Howard County, 31 Md.App. 8, 354 A.2d 210, cert. den. 278 Md. 719 (1975) 15

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) 17

Dolan v. City of Tigard, 512 U.S. ____, 129 L.Ed.2d 304, 114 S.Ct. 2309 (1994) 19, 21

Edgewood Nursing Home v. Maxwell, 282 Md. 422 (1978) 21

Gardner v. Baltimore Mayor & City Council, 969 F.2d 63 (4th Cir. 1992) 13

Gertz v. Anne Arundel County, Maryland, 339 Md. 261, 661 A.2d 1157 (1995) 9

Grant v. City of Baltimore, 212 Md. 301 (1957) 22

Holmes v. Maryland Reclamation Associates, Inc., 90 Md. App. 105 cert. dismissed, 328 Md. 229 (1992) 17

Linton v. Frederick County Board of County Commissioners, 964 F.2d 1436 (4th Cir. 1992) 13

Maryland Board of Pharmacy v. Sav-a-Lot, Inc., 270 Md. 103, 311 A.2d 242 (1973) 21

Nollan v. California Coastal Commission, 483 U.S. 835, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) . . . 20, 21

Prince George's County v. Sunrise Development Ltd. Part., 330 Md. 297, 623 A.2d 1296 (1993) 14, 15

Regents of University of Michigan v. Ewing, 474 U.S. 214, 106 S.Ct. 507, 88 L. Ed.2d 523 (1985) 16

Richardson v. Town of Eastover, 922 F.2d 1152 (4th Cir. 1991) 13

Richmond Corp. v. Board of County Commissioners for Prince Georges County, 254 Md. 244, 255 A.2d 398 (1969) 15

Ross v. Montgomery County, 252 Md. 497, 250 A.2d 635 (1968) 15

Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983) 13, 21

State Commission on Human Relations v. Amecom Division of Litton Systems Inc., 278 Md. 120, 360 A.2d 1 (1976) 16

Sylvia Development Corporation v. Calvert County, Maryland, 48 F.3d 810 (4th Cir. 1995) 13

U.S. v. Locke, 471 U.S. 84, 107 S.Ct. 1785, 85 L.Ed.2d 64 (1985) 19

Statutes

42 U.S.C. Section 1983 . 3, 4, 7, 8, 9, 10, 11, 14, 22, 23

Ordinances

Anne Arundel County, Maryland, Bill No. 28-90 . . . . 4, 5, 6, 9, 12, 14, 16, 17, 18, 19, 20

Constitutional Provisions

United States Constitution:
Fifth Amendment 20
Fourteenth Amendment . 2, 3, 4, 10, 11

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

No. ____

ROBERT E. GERTZ, Petitioner

v.

ANNE ARUNDEL COUNTY, MARYLAND, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Robert E. Gertz, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland, entered in the above-entitled case on July 21, 1995.

OPINIONS BELOW

The July 21, 1995 opinion of the Court of Appeals of Maryland, whose judgment is herein sought to be reviewed, is reported at 339 Md. 261, 661 A.2d 1157 (1995), and is reprinted in the separate Appendix to the Petition, pp. A.1-20. The prior opinion of the Court of Special Appeals of Maryland was entered December 8, 1993, No. 194, is unreported and is reprinted in the Appendix to this Petition, pp. A.21-32. Prior to appellate review, this case was heard and an oral opinion on the merits rendered by Judge Bruce C. Williams of the Circuit Court for Anne Arundel County, Maryland on December

10, 1992, Case No. 3114763, a transcript of which is reprinted in the Appendix, pp. A.33-37. Several months before Judge Williams rendered his decision, Judge Warren B. Duckett of the Circuit Court for Anne Arundel County, Maryland issued an Opinion and Order dated February 19, 1992 in response to the parties' Motions for Summary Judgment, Case No. 3114763, a copy of which is reprinted in the Appendix, pp. A.38-43. Also included in the Appendix are copies of the Ex Parte Injunction, Interlocutory Injunction and Order Modifying Injunction between the parties in Case No. 3114763 in the Circuit Court for Anne Arundel County, Maryland, reprinted on pp. A.44-49. In addition, the transcribed opinion of Judge Martin A. Wolff, Circuit Court for Anne Arundel County, Maryland in the case of Anne Arundel County v. Robert Gertz, Case No. 3107030, dated December 21, 1989 is reprinted in the Appendix to the Petition, pp. A.50-57.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on July 21, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or

> naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Also at issue in this case is the applicability of 42 U.S.C. Section 1983, which provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be

considered to be a statute of the District of Columbia.

The local ordinance involved, Bill No. 28-90, enacted on April 23, 1990 by the County Council of Anne Arundel County, Maryland, is reprinted in the Appendix, pp. A.58-70.

STATEMENT OF THE CASE

Type of Action

This case involves a use of land enjoined by governmental action applying a law enacted after the use was vested. Petitioner Robert E. Gertz ("Gertz") filed a Complaint for Declaratory Judgment against Respondent Anne Arundel County, Maryland ("the County") on July 6, 1990 in the Circuit Court for Anne Arundel County, Md. which Complaint was amended on August 14, 1990 to include an action for violation of 42 U.S.C. Section 1983 pursuant to the Fourteenth Amendment of the U.S. Constitution. Gertz amended his complaint following the County's enforcement of a new zoning ordinance, Bill 28-90 (Appendix, pp. A.58-70), through injunctive action (Appendix, pp. A.44-49). The new zoning ordinance purported to regulate sanitary landfills through permit requirements. The County's injunction against Petitioner prohibited Gertz from filling ravines on his farm property with organic materials, a use of the property that the County had specifically agreed to in a Consent Agreement in 1985, several years before enactment of Bill 28-90. In addition, Gertz' use of the property in this manner

had been declared a valid agricultural land management practice, exempt from grading permit requirements, in an opinion rendered by Judge Martin A. Wolff in the Circuit Court for Anne Arundel County, Maryland on December 21, 1989 (Anne Arundel County, Maryland v. Gertz, Case No. 3107030, Appendix, pp. A.50-57) four months before enactment of Bill 28-90.

History of Disputes Between the Parties

On August 20, 1985, Gertz and the County entered into a Consent Agreement (the "1985 Consent Agreement," Appendix, pp. A.71-73). The Consent Agreement allowed Gertz to fill ravines on his farm property with "raw tree material consisting of root material, brush, tree limbs and stumps" or "any rubble originating off-site" for Gertz' "and/or occupant's farming and/or personal use." However, because the parties continued to have disputes subsequent to the 1985 Consent Agreement, a separate agreement, dated June 10, 1988 was entered into (the "1988 Contract", Appendix, pp. A.74-84). The 1988 Contract, in addition to allowing filling of ravines and construction of a pond in the same manner allowed in the 1985 Consent Agreement, also allowed "slash, stumps, root mat and clean earth" and expressly recognized that the filling project was a "Conservation Plan," a "farm plan concerning pasture establishment;" that the "pond is already a part of [Gertz's] farm plan" and was "installed as a multipurpose recreation-wildlife area and sediment basin;" and that the "pond and proposed pasture use are part of the conservation plan."

Subsequent to execution of the 1988 Contract, disputes continued and the County filed a Petition for Contempt against Gertz which case was heard by the Honorable Martin A. Wolff. Judge Wolff ruled that Gertz was not in contempt of the Consent Agreement; that Gertz was allowed to farm under the Consent Agreement between the parties; and that the filling activity was not a sanitary landfill requiring a grading permit, but constituted farming. The County did not appeal Judge Wolff's decision. (Anne Arundel County v. Gertz, Case No. 3107030, Appendix. pp. A.50-57)

Four months after Judge Wolff's decision, the County enacted Bill No. 28-90, an "emergency ordinance," regulating sanitary landfills. Gertz received a letter from the County dated June 4, 1990 advising him that he was in violation of the new ordinance; that he was required to obtain "a permit to operate a sanitary landfill;" and that failure to comply with Bill 28-90 "may result in legal action." (Appendix, p. A.85) The ordinance required, among other things, that if the land being filled is zoned RA, then the minimum land area must be at least one hundred (100) acres. Because of the long relationship between the parties, the County knew Gertz' property (zoned RA) was less than 100 acres in its entirety and thus Gertz did not, by definition, qualify for a permit under Bill 28-90. If he attempted to comply with the new ordinance, he would be denied a permit; if he did not comply, the County would still enjoin a use of the property it had specifically permitted since 1985. The

ordinance also granted to Anne Arundel County, upon completion of the filling project, a recreation or open space easement in the entire property without compensation to the landowner. The ordinance listed several other requirements such as large permit fees, fencing, and costly engineering plans.

Relying on Judge Wolff's decision, Gertz filed, without counsel, a Complaint for Declaratory Judgment. The County then filed a Counterclaim (for Immediate, Interlocutory, Ex Parte and Permanent Injunctive and Other Relief). The ex parte injunction was granted on July 20, 1990 (Appendix, pp. A.48-49); Gertz retained counsel and, after a hearing on Gertz' Motion to Dissolve, an interlocutory injunction was issued against Gertz prohibiting him from filling ravines with off-site materials as allowed under the 1985 Consent Agreement and the 1988 Contract with the County. (Appendix, pp. A.46-47) Thereafter, Gertz filed his Amended Complaint alleging violation of 42 U.S.C. Section 1983.

Over the next eight months following issuance of the injunction, Gertz was enjoined from filling ravines on his property as permitted under the 1985 Consent Agreement and 1988 Contract and thus was out of business since the filling was his primary source of income. Gertz ultimately intended to complete the filling project resulting in more level pasture which would enable him to establish a horse boarding operation on his farm.

Both parties filed Motions for Summary Judgment and Judge Warren B. Duckett, Jr. heard both Motions on June 18, 1991, issuing an Order on February 19, 1992, in Gertz' favor, holding that Gertz had a vested right to his activities likening his right under the 1985 Consent Agreement and the 1988 Contract to a permit or license (Appendix, pp. A.39-43). After Judge Duckett's ruling, Gertz was finally allowed to continue his filling activity after seventeen (17) months of being deprived of this right and suffering great economic loss and property damage.

At the subsequent trial on damages, Judge Bruce C. Williams required the parties to present evidence on both liability and damages. During two days of testimony, the evidence showed that Gertz' filling activity had not changed in nature and purpose since the late 1970's/early 1980's; Appellant was still filling for farming purposes.

The Rulings Below

At the conclusion of Gertz' case, the County moved for judgment which Judge Williams granted, denying Gertz all claims for relief, constitutional and otherwise. (Appendix, pp. A.33-37)

Upon appeal, the Maryland Court of Special Appeals reversed and remanded the breach of contract claim to the Circuit Court for a determination as to whether the County had breached its contract and, if so, what damages should be awarded. The Court of Special Appeals, however, held that 42 U.S.C. Section 1983 is

inapplicable. (Case No. 194, December 8, 1993, Appendix, pp. A.21-32) The Court of Appeals of Maryland granted Certiorari to determine the applicability of 42 U.S.C. Section 1983 and issues raised in the County's Cross-Petition regarding the doctrine of res judicata.

In its opinion, dated July 21, 1995, the Court of Appeals found that the doctrine of res judicata did not bar the County's claim to enforce Bill 28-90 through injunctive action; that Judge Warren B. Duckett's Opinion and Order regarding the Motions for Summary Judgment was not the law of the case; and that Gertz suffered no constitutional deprivation as a result of the County's injunctive action prohibiting him from a use of property that the County had specifically permitted for a number of years. (Gertz v. Anne Arundel County, Md. 339 Md. 261, 661 A.2d 1157 (1995), Appendix, pp. A.1-20).

REASONS FOR GRANTING THE WRIT

Introduction

In its holding in this case, the Court of Appeals of Maryland found that Gertz suffered no constitutional deprivation and was therefore not entitled to damages under 42 U.S.C. § 1983. However, the Court cited no precedent to support its decision and ignored the legal standards set forth in Biser v. Town of Bel Air, Maryland, 778 F.Supp. 249, aff. 991 F.2d 100, cert. den. 114 S.Ct. 182, 126 L.Ed.2d 141 (1993) and other federal cases cited by Gertz in which Section 1983

claims are brought under the Due Process Clause of the Fourteenth Amendment.

Because the Court of Appeals failed to state any legal grounds whatsoever in its decision, and because the facts in this case, which are undisputed, show that the County's actions against Gertz are a violation of constitutional law and federal statute, this Court should determine whether such a violation occurred. As it now sands, 42 U.S.C. § 1983 has "no teeth" in the State of Maryland and even a citizen's vested property rights are summarily ignored while, in other states, the same such rights are protected. Further, the Court of Appeals' decision amounts to a repudiation of the law of vested rights as recognized by other states and federal courts and allows a county to undermine its own binding agreements under color of state law and guise of the police power, use its legislative authority to alter those agreements by designing a statute with requirements a landowner cannot meet, depriving the landowner of vested rights, and then escape applicability of 42 U.S.C. § 1983.

Gertz' Property Interest

As stated in Biser v. Town of Bel Air, Maryland, supra., 778 F.Supp. 249, 252:

> The Supreme Court has set forth three types of Section 1983 claims that may be brought against the State under the Due Process Clause of the Fourteenth

> Amendment. First, the Clause incorporates many of the specific protections defined in the Bill of Rights...Second, the Due Process Clause contains a 'guarantee of fair procedure...' A third type of Constitutional protection actionable under Section 1983...is substantive due process. The substantive component of the Due Process Clause bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them...' The right to be free from arbitrary state action is a substantive due process right that arises directly from the constitution. (Citations omitted).

The case at bar is of the third type of claim--a violation by the County of Gertz' substantive due process rights. Several Fourth Circuit cases have set forth the standard for determining whether substantive due process rights have been violated. In Biser, the Court explained what it termed the "standard of entitlement" in the following manner:

> In order for Biser to state a substantive due process claim, he must first demonstrate that he possesses a 'cognizable property interest, rooted in state law,' in the lost benefit...A property interest requires more than a 'unilateral expectation' that a permit or

> license will be issued; instead, there must be a 'legitimate claim of entitlement...' In applying this standard of entitlement, we have held that if a local agency has '[a]ny significant discretion' in determining whether a permit should issue, then a claimant has no legitimate entitlement and, hence, no cognizable property interest. Id. at 991 F.2d 100, 103-104; (Citations omitted).

In Biser, the claimant "had only a unilateral expectation that he would receive the special exception" and, thus, no cognizable property right under the due process clause. Id. at 104. The legal right to the permit had to exist before the permit application was denied and the claim of entitlement, wrote the Court, "must come from 'an existing legislative or administrative standard.'" Id. at 104.

Contrary to the plaintiff in Biser, Gertz had possession of his "permit", the Consent Agreement and 1988 Contract, before the County enacted and enforced Bill 28-90 through injunctive action prohibiting Gertz' filling activities. As Judge Duckett stated in his Order granting Gertz Summary Judgment, "While this Consent Agreement is not a 'permit' as that word is typically used in zoning cases, its effect is exactly the same. Both the Consent Agreement and a permit give permission to an individual to engage in a particular activity and they should therefore be treated as being synonymous."

(Appendix, p. A.41) Further, it cannot be said that the County had "any significant discretion conferred upon [it]" in terminating or altering the agreements between the parties because the agreements did not allow for unilateral termination. Gardner v. Baltimore Mayor & City Council, 969 F.2d 63, 68 (4th Cir. 1992). See also Richardson v. Town of Eastover, 922 F.2d 1152 (4th Cir. 1991) (plaintiff had legitimate claim of entitlement to business license where ordinance required finding of cause to withhold license and renewal of license had been summarily permitted for six or seven years); Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983) (developer entitled to issuance of permit under state law, the issuance of which was taken from him by manifest arbitrariness and unfairness); Linton v. Frederick County Board of County Commissioners, 964 F.2d 1436 (4th Cir. 1992) (employee who could be discharged only for cause had a constitutionally protected property interest in employment with the county). See also the recent case of Sylvia Development Corporation v. Calvert County, Maryland, 48 F.3d 810 (4th Cir. 1995).

When the "standard of entitlement" as set forth in the above cases is applied to the facts of the instant case, it is evident that Gertz does possess a "'cognizable property interest, rooted in state law.'" Biser, 991 F.2d at 103. Unlike Biser, Gertz did not have a mere "unilateral expectation" in a permit to fill his property, he had written agreements and court decrees guaranteeing him such a right. There was nothing

discretionary either in Judge Wolff's 1989 ruling or the agreements between the parties: under existing legal standards, Gertz was entitled to farm pursuant to the terms of the Consent Agreement and the filling activity was, in fact, a valid agricultural land management practice or farming. There was no doubt on the part of the County that as a governmental entity imbued with such authority, it had granted Gertz permission under then-existing legislative standards to fill ravines for farming and/or personal purposes before enacting and enforcing Bill 28-90.

Therefore, utilizing the "standard of entitlement," it is clear that Gertz' interest in the 1985 Consent Agreement and the 1988 Contract is constitutionally protected property for purposes of 42 U.S.C. Section 1983 and the Court of Appeals of Maryland failed to recognize this.

Gertz' Property Interest Is "Rooted in State Law"

In Prince George's County v. Sunrise Development Ltd. Part., 330 Md. 297, 623 A.2d 1296 (1993), the Court of Appeals of Maryland held that, "in order for rights to be vested before a change in the law, the work done must be recognizable, on inspection of the property by a reasonable member of the public, as the commencement of construction of a building for a use permitted under the then current zoning." Id. at 314. Judge Duckett followed this reasoning when he granted summary judgment in Gertz' favor on due process grounds:

"For Gertz 'to have been denied due process, he must have had a vested right to the zoning classification which he lost by operation of law and time.'" (Appendix, p. A.39) Judge Duckett then cited the cases of Colwell v. Howard County, 31 Md.App. 8, 354 A.2d 210 (1975); Ross v. Montgomery County, 252 Md. 497, 250 A.2d 635 (1968); and Richmond Corp. v. Board of County Commissioners for Prince George's County, 254 Md. 244, 255 A.2d 398 (1969) which state the requirements for acquiring a vested right: 1) possession of a permit and 2) knowledge of the use by the neighborhood.

Using the permit/knowledge of the neighborhood test, it is again evident that Gertz has a cognizable property interest rooted in state law. As Judge Duckett found, it is undisputed that the County granted express permission and allowed the filling activities under the 1985 Consent Agreement and 1988 Contract. It is also "undisputed," wrote Judge Duckett, "that Gertz has engaged in the filling activities permitted by the Consent Agreement continuously from the date of the Consent Agreement." (Appendix, p. A.42)

Thus, the two requirements set forth in Ross, supra., and rephrased in Sunrise, supra.--permission and neighborhood knowledge of the use--are satisfied and, as Judge Duckett ruled, Gertz "has a vested right in the filling activities permitted in the Consent Agreement."

It is also the law of Maryland that a law affects substantive rights when the

terms of a contract are altered. State Commission on Human Relations v. Amecom Division of Litton Systems, Inc., 278 Md. 120, 360 A.2d 1 (1976) At least twice, once in the County's Motion to Dismiss and again in its Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, the County admitted that with the enactment of Bill 28-90, the agreement between the parties was altered. Therefore, by its own admission, the County's enforcement of Bill 28-90 against Gertz affected his substantive rights by altering the parties' agreements.

When Maryland state law concerning vested rights is applied in this case, the only conclusion one can draw is that Gertz' property interest is, in fact, "rooted in state law" and is a constitutionally protected vested property interest which the State of Maryland failed to protect.

Abuse of Power

"The touchstone of due process is protection of the individual against the arbitrary exercise of the powers of government." Biser, supra. at 778 F.Supp. 253 (citations omitted).

> In short, the doctrine of substantive due process is a constitutionally imposed limitation, see Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 229, 106 S.Ct. 507, 515, 88 L.Ed.2d 523 (1985) (Powell, J., concurring), which is intended only "to prevent government

'from abusing [its] power, or employing it as an instrument of oppression.'" Collins v. City of Harker Heights, 503 U.S. 115, 126, 112 S.Ct. 1061, 1069, 117 L.Ed.2d 261 (1992) (quoting DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 196, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989).

In this case, the undisputed facts amply demonstrate the burdensome, unreasonable and oppressive measures the County was willing to impose on Gertz despite their agreements. Rather than appeal Judge Wolff's decision, the County decided it could get what it wanted another way--legislative action. Rather than go through months of the judicial process, the County decided to create, enact and enforce Bill 28-90, an "emergency" ordinance which by design would force Gertz to stop his filling activity and could be instituted against him within four months of Judge Wolff's decision.[1]

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[1]Maryland's Court of Special Appeals has ruled in Holmes v. Maryland Reclamation Associates, Inc., 90 Md.App. 105, cert. dismissed 328 Md. 229 (1992) that the State of Maryland has preempted the field in granting or denying permits for solid waste management systems such as rubble landfills, and that a county may not usurp the State's permit granting process. Since Bill 28-90 purported to allow the County to grant

Bill 28-90 applies to sanitary landfills "operated solely for the disposal of rubble"; requires the land area to be "at least 100 acres" if zoned RA; requires "fencing and screening that is at least six feet high"; calls for engineering plans and material; large bond and permit fees; limits work hours; requires wheel washers, daily inspections, building and location restrictions; and grants to the County, without compensation to the landowner, "a recreation or open space easement." (Appendix, pp. A.66-68)[2]

It is undisputed that Gertz' farm property, a continuing family enterprise, is not operated "solely for the disposal of rubble" and that the entire acreage is not 100 acres but less than 87, the fill area being only about two acres. Thus, the County's enforcement of Bill 28-90

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a permit for a rubble fill, Bill 28-90 would also appear to be invalid on those separate grounds. This issue was raised in an Amicus brief in this case, but was not referred to, nor was it made a part of, the Court of Appeals decision.

[2] It is interesting to note that in its Answers to Interrogatories, the County could list only five other persons or entities besides Gertz who were affected by Bill 28-90. All were commercial landfill operators and none of those listed were farmers who had agreements with the County. No permits were ever issued pursuant to this "emergency" known as Bill 28-90.

against Gertz entirely prohibited Gertz' vested use under the 1985 Consent Agreement and 1988 Contract since Gertz' property cannot qualify for such use under Bill 28-90. The Court of Appeals of Maryland completely ignored this fact in its holding when it stated, "He was subject to the Ordinance and failed to obtain a sanitary landfill permit." (Appendix, p. A-19) The Court of Appeals incorrectly held that Gertz could obtain a permit and continue filling ravines on his property.

The County enacted and applied this "Catch-22" ordinance to Gertz with full knowledge that 1) application of Bill 28-90 to Gertz was in contravention of Judge Wolff's unappealed holding and the County's own agreements with Gertz, and 2) that even if Gertz attempted to comply, he would not be able to meet the requirements and obligations of the new law which the County imposed while acting under color of state law. Gertz' refusal to comply or his willingness to comply would yield the same result: the complete prohibition of Gertz' filling activity despite the County's contractual obligations, and the inevitable economic loss to Gertz. See U.S. v. Locke, 471 U.S. 84, 107 S.Ct. 1785, 85 L.Ed.2d 64, 82 (1985) (with respect to vested property rights, a legislature has power to impose new regulatory constraints as long as the constraint or duty imposed is a reasonable restriction designed to further legislative objectives) In Locke, the restrictions were minimal; in the instant case, the new regulatory constraints were

completely prohibitive of Gertz' vested rights.

In addition, recent Supreme Court cases have held that the sort of public recreational easement that the County required permit holders to grant to the County under Bill 28-90 constitutes an unconstitutional taking under the Fifth Amendment. As the Court noted in Dolan v. City of Tigard, 512 U.S. ____, 129 L.Ed.2d 304, 114 S.Ct. 2309 (1994), the "right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property." Id., at 129 L.Ed.2d 316, citation omitted. The Court found that, by the City imposing a recreational easement similar to that required by Bill 28-90, Dolan's right to exclude "would not be regulated, it would be eviscerated." Id. at 322. In fact, Bill 28-90 required a recreational easement over the entire Gertz property while in Dolan the easement only affected a fifteen foot strip of land making this taking more severe. Id. at 313. The Court also concluded that there was no nexus between the required easement and the legitimate state interest involved and that the state had the burden to prove that nexus. Id. at 322-323; see also dissents of Justice Stevens, at 325, and Justice Souter, at 334. "The evident constitutional propriety [of exercise of the police power] disappears ... if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." Nollan v. California Coastal Commission, 483 U.S. 835, 107 S.Ct. 3141, 3148, 97 L.Ed.2d 677 (1987).

In the present case, the County's interest in regulating commercial landfills to protect the environment had no reasonable relationship, no nexus, to its requirement that Gertz' entire private farmland and future horse ranch be permanently dedicated to the public's recreational use. This taking of an easement, though a secondary issue because Gertz never applied for a permit, extends beyond Gertz' real property; the County did succeed in a taking of Gertz' permit and did enjoin a vested use of property under guise of the police power. Scott, supra, at 1421. (where a previously valid permit has issued and construction begun, a subsequent rezoning that effectively revokes permission to build is a confiscatory taking of the permit itself) (Citations omitted)

Although the County has consistently argued that its actions against Gertz were merely a reasonable exercise of police power, the police power is not an unbridled exercise giving counties the authority to transcend the state and federal constitutions, the highest law. "If a statute purporting to have been enacted to protect the public morals or safety is a palpable invasion of rights secured by fundamental law, then effect must be given to the Constitution." Maryland Board of Pharmacy v. Sav-a-Lot, 270 Md. 103, 322 A.2d 242 (1973); Edgewood Nursing Home v. Maxwell, supra. at 427; see also Dolan v. City of Tigard and Nollan v. California Coastal Commission, supra.

In this case, the County enforced new

zoning legislation through injunctive action which resulted in the immediate cessation of a nonconforming use otherwise lawful. Such action is unreasonable and unconstitutional. Grant v. City of Baltimore, 212 Md. 301 (1957). There is no dispute that Gertz' activity constitutes a nonconforming use since the County admitted such in its Brief in the court below. The Court of Appeals, however, ignored this argument and failed to even mention the relevance of Gertz' activity as a nonconforming use. The case of Browning-Ferris Industries of St. Louis, Inc. v. City of Maryland Heights, Missouri, 747 F.Supp. 1340 (1990) is very much on point in this regard and supports Gertz' position that the County's injunctive action against him was arbitrary and capricious and violated his substantive due process rights and, therefore, violated 42 U.S.C. §1983. In fact, Gertz' case is even stronger since the City in Browning-Ferris did not require the operation of the landfill to stop as the County was able to accomplish in the instant case for a period of 17 months, a deprivation not lifted until Judge Duckett's Order on February 19, 1992. (Appendix, p.p. A.38-43) By that time, however, the damage was done; Gertz' substantive due process rights were violated by the action of the County, his income was substantially reduced, his farm property, in particular a pond, was severely eroded and damaged because Gertz was enjoined from bringing in fill necessary to complete erosion control on the pond. That damage was later repaired at great expense to Gertz.

CONCLUSION

Although the facts of Mr. Gertz' struggle with the County may be unique, the situation described to this Court is fully capable of repeating itself, especially in the State of Maryland since the Court of Appeals decision destroys any hope that 42 U.S.C. §1983 is taken seriously or has any effect within Maryland's boundaries. In this case, Anne Arundel County and the State of Maryland should be held fully accountable for a blatant abuse of power and wrongful, arbitrary treatment of Gertz under 42 U.S.C. Section 1983. The standard of entitlement, set forth in the cases cited in this Petition, supports Gertz' claim that he has a protectible property interest rooted in state law. The actions and admissions of the County amply demonstrate that it orchestrated legislation which completely prohibited a valid vested use of property specifically agreed to.

WHEREFORE, Petitioner Gertz respectfully prays that a Writ of Certiorari be granted.

James L. Mayer, Counsel of Record

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

ROBERT E. GERTZ, Petitioner

v.

ANNE ARUNDEL COUNTY, MARYLAND, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

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Appendix:

A. Opinion of the Court of Appeals of Maryland A.1
B. Opinion of the Court of Special Appeals of Maryland . A.21
C. Judgment of Judge Bruce C. Williams, Circuit Court for Anne Arundel County, Maryland A.33
D. Opinion and Order of Judge Warren B. Duckett, Jr., Circuit Court for Anne Arundel County, Maryland . . . A.38
E. Order of Judge Eugene M. Lerner Modifying Injunction, Circuit Court for Anne Arundel County, Maryland . . . A.44
F. Interlocutory Injunction of Judge Eugene M. Lerner, Circuit Court for Anne Arundel County, Maryland . . A.46
G. Ex Parte Injunction, Circuit Court for Anne Arundel County, Maryland A.48
H. Opinion of Judge Martin A. Wolff, Circuit Court for Anne Arundel County, Maryland A.50
I. Bill No. 28-90, April 23, 1990, County Council for Anne Arundel County, Maryland A.58
J. 1985 Consent Agreement A.71
K. 1988 Contract A.74
L. Letter of June 4, 1990 . . . . A.85

GERTZ v. ANNE ARUNDEL COUNTY
[339 Md. 261 (1995).]
661 A.2d 1157

Robert E. GERTZ
v.
ANNE ARUNDEL COUNTY, Maryland

No. 13, Sept. Term, 1994
Court of Appeals of Maryland
July 21, 1995

Landowner sought declaratory and other relief from application of new sanitary landfill ordinance to his property, which he was filling with rubble for agricultural purposes. County counterclaimed for injunctive relief. The Circuit Court, Anne Arundel County, Warren B. Duckett, Jr., J., entered partial summary judgment for landowner on declaratory judgment count, finding that he had vested right under earlier consent agreement to fill land, but the Circuit Court, Bruce C. Williams, J., granted final judgment in favor of county, ruling on all issues in case and determining that landowner's filling of property went beyond farming activity permitted by consent agreement. The Court of Special Appeals, 98 Md.App. 734, 98 Md.App. 738, reversed and remanded. Landowner petitioned for certiorari, and county cross-petitioned. The Court of Appeals, Raker, J., held that: (1) earlier determination in contempt proceeding on consent agreement did not have res judicata effect barring counterclaim for injunctive relief; (2) initial partial summary judgment order did not bar contrary ruling regarding application of ordinance in final judgment under law of case doctrine; and (3) landowner had no claim under § 1983.

Judgment of Court of Special Appeals affirmed in part, reversed in part and remanded.

GERTZ v. ANNE ARUNDEL COUNTY
[339 Md. 261 (1995).]

1. Judgment 713(2), 720

Doctrine of res judicata bars litigation of cause of action or claim after it has already been or could have been decided.

2. Judgment 552

Res judicata did not bar county from seeking injunctive relief to enforce newly enacted sanitary landfill ordinance on basis of earlier contempt proceeding in which court determined that landowner's filling activity was farming and did not violate consent agreement with county, which prohibited other dumping. Anne Arundel, Md., County Code, art. 14, §§ 4-101 to 4-109; art. 28, §§ 1-101(55B, 57), 11-112(a), 12-242.

3. Judgment 301

Order that does not adjudicate all claims in action or that adjudicates less than entire claim, or that adjudicates liabilities of fewer than all parties to action is not final judgment and may be revised at any time before entry of final judgment. Md. Rule 2-602(a).

4. Courts 99(3)

Law of case doctrine did not preclude second trial court from ruling, contrary to first trial court, which adjudicated only landowner's declaratory judgment claim on motion for partial summary judgment, that sanitary landfill ordinance applied to landowner's dumping activities where first trial court did not adjudicate all claims in action and thus did not enter final judgment. Md.Rule 2-602(a).

GERTZ v. ANNE ARUNDEL COUNTY
[339 Md. 261 (1995).]

5. Civil Rights 130
Eminent Domain 2(1.2)

Landowner did not have § 1983 claim arising from enactment and application of sanitary landfill ordinance to his property following entry of consent decree permitting him to fill land with rubble for agricultural purposes; consent agreement with county did not entitle landowner to exemption from future legislation regulating all sanitary landfills, and thus county did not effect unconstitutional taking of his property. U.S.C.A. Const.Amends. 5, 14; 42 U.S.C.A. § 1983; Anne Arundel, Md., County Code, art. 14, §§ 4-101 to 4-109, art. 28, §§ 1-101(55B, 57), 11-112(a), 12-242.

Susan S. James Mayer (James L. Mayer, on brief), Columbia, for petitioner.

Francis M. Gasperich, Crownsville, for amicus curiae.

Judson P. Garrett, Jr., County Atty. (Robert M. Pollock, Sr. Asst. County Atty., on brief), Annapolis, for respondent.

Argued before MURPHY, C.J., AND ELDRIDGE, RODOWSKY, CHASANOW, KARWACKI, BELL and RAKER, JJ.

RAKER, Judge.

In this case we are asked to decide whether the conduct of Anne Arundel County in enacting and enforcing an ordinance regulating sanitary landfills, passed

as emergency legislation after a judgment in favor of a landowner against Anne Arundel County, gives rise to a cause of action under 42 U.S.C. § 1983 (1988). We must also decide whether, under the doctrine of *res judicata*, the judgment bars Anne Arundel County from subsequently applying the ordinance to land filling activity on the property. We answer both questions in the negative.

I.

This appeal arises out of an action for declaratory and other relief filed by Robert E. Gertz ("Gertz") in the Circuit Court for Anne Arundel County. He sought a declaratory judgment that Bill No. 28-90 ("the Ordinance"), entitled "AN EMERGENCY ORDINANCE concerning: Zoning and Environmental Health-Applications for Sanitary Landfills, including Rubble Landfills," does not apply to his land filling activity. In response, Anne Arundel County ("the County") filed a counterclaim seeking an injunction to enjoin Gertz's activities until he obtained a landfill permit required by the Ordinance.

The land filling activity at issue here involves Gertz's plan to establish a farm on his property in Anne Arundel County to be used as a horse boarding operation. To that end, he was filling ravines on his property with raw tree materials to establish pasture land. The fees he charged others to accept their organic fill served as his primary source of income.

The present suit over whether the Ordinance applies to Gertz is rooted in two earlier events. First, in 1985, the parties settled a grading permit dispute by entering into a Consent Agreement (the "Agreement") that

allowed Gertz to dump, place, dispose, or otherwise store on his land loads from off-site of raw tree material for his farming and/or personal use.[1] It stated in pertinent part:

1. That [Gertz], *except for his and/or occupant's farming and/or personal use*, shall not dump, place, dispose, or otherwise store any bulk loads from off-site of raw tree material consisting of root material, brush, tree limbs and stumps or otherwise dispose or store any rubble originating off-site on the Property which is the subject of this proceeding, unless otherwise or subsequently specifically permitted by law.

* * * * * * *

7. That *this Consent Order shall be binding on the heirs, assigns and successors in interest of the parties.*

(Emphasis added.) Gertz and the County later agreed to a slight modification of the Agreement following continued disputes and erosion problems.

Second, in 1989, after a dispute arose between the parties as to the nature of Gertz's activities under the Agreement, the County filed a Petition for Contempt in the Circuit Court for Anne Arundel County. On December 21, 1989, the Honorable Martin A. Wolff found

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[1] The County had filed a grading permit enforcement action against Gertz, alleging that he was engaged in unpermitted grading and filling on the property. Gertz denied liability and claimed an agricultural exemption.

Gertz not in contempt, ruling that his land filling activity was farming and permissible under the Agreement ("the Wolff decision").

On April 23, 1990, the County enacted Bill No. 28-90, "[a]n emergency ordinance," which amended Articles 14 and 28 of the Anne Arundel County Code and created new requirements for sanitary landfills. *See* Anne Arundel County Code Art. 14, §§ 4-101 to 4-109 1987-1993 (Environmental Health), Art. 28, §§ 1-101(55B), 1-101(57), 11-112(a), 12-242 1993-1994 (Zoning). Specifically, the definition of "sanitary landfill" was modified to include the planned disposal of "rubble." *Id.* art. 14, § 4-101(f)(2). Rubble is defined, in part, as stumps, brush, roots and topsoil. *See* C.O.M.A.R. 26.04.07.11B, 26.04.07.13B. Thus, rubble includes the raw tree materials that Gertz was using to fill his ravines.

Gertz was advised in a letter dated June 4, 1990, that he was using his property as a "rubble landfill" and that he was required by the new Ordinance to obtain a sanitary landfill permit to continue this use. He then filed a declaratory judgment action, and the County responded with a counter-claim for injunctive relief.

After the circuit court issued an interlocutory injunction, Gertz filed an Amended Complaint containing four counts. Count One, claiming breach of contract (of the Consent Agreement), alleged that the County breached its contract with him by enacting legislation and pursuing injunctive relief that prohibited his land filling activity. He averred that his activities constituted farming, as previously determined by the circuit court (the Wolff decision), and, as such, are his contractual right. In Count

Two, specific performance, Gertz asked the circuit court to order the County to specifically perform its contract by allowing him to continue his filling activity without the necessity of a sanitary landfill permit. In Count Three, the declaratory judgment claim, Gertz asked the court to declare that "[his] fill activities are allowable by law and under the Contract; the [he] need not obtain a permit under Bill 28-90; that retroactive application of Bill No. 28-90 is a violation of [his] constitutional rights; [and] that requiring [him] to obtain a permit and [the County's] work stoppage is an unconstitutional taking of [his] property." Finally, in Count Four, invoking U.S.C. § 1983, Gertz averred that as a result of the County's enactment of the Ordinance and subsequent injunctive action, the County unconstitutionally impaired his contract rights and violated his property rights under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and Article 24 of the Maryland Declaration of Rights.[2]

Both parties filed motions for summary judgment. The circuit court, the Honorable Warren B. Duckett, Jr., presiding, found in favor of Gertz on the declaratory judgment count, and issued an order stating that Gertz had a vested right in his land filling activities and that the County was estopped from enforcing the Ordinance against him ("the Duckett decision"). The interlocutory injunction was dissolved. Judge Duckett did not, however, address the breach of contract claim or the 42 U.S.C. § 1983 claim.

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[2] At oral argument before this Court, Gertz expressly stated that he is not alleging a violation of the Contract Clause of the U.S. Constitution.

The matter was then set before the Honorable Bruce C. Williams, who granted final judgment in favor of the County. Judge Williams ruled that all of the issues in the case, liability as well as damages, were before him. Following an evidentiary hearing, and contrary to the ruling of Judge Duckett, Judge Williams concluded that the provisions of the Ordinance applied to Gertz. He ruled that the Consent Agreement did not permit Gertz to run a commercial landfill for profit, and found that his filling activity went beyond farming and constituted a commercial landfill operation. Finding no breach of the Consent Agreement, Judge Williams concluded there was no interference with a vested right and thus no proof of a claim under 42 U.S.C. § 1983.

Gertz appealed and, in an unreported opinion, the Court of Special Appeals held (1) that the 1989 Wolff decision was *res judicata* as to the issues before Judge Williams, and (2) that 42 U.S.C. § 1983 is inapplicable in this case. According to the intermediate appellate court, the only issues before Judge Williams were whether, as a result of the acts by the County, damages could be awarded under either breach of contract or § 1983. The court reasoned that *res judicata* barred Judge Williams from reconsidering that nature of Gertz's filling activity, i.e., whether he was running a landfill or whether he was farming. The court concluded that because Gertz's activities had not changed since Judge Wolff found that he was farming, the only issue before Judge Williams was whether the agreement had been breached and, if so, the nature of the damages. Those issues were remanded to the circuit court. In addition, the Court of Special Appeals found that based on the law of the case doctrine, the Duckett decision that the Ordinance did not apply to

Gertz precluded Judge Williams from revisiting that question. Having concluded that the Ordinance did not apply to Gertz, the court found § 1983 inapplicable in this case.

We granted Gertz's petition for a writ of certiorari on the 42 U.S.C. § 1983 claim and the cross-petition of the County on the applicability of the doctrine of *res judicata*. We shall first consider whether the Court of Special Appeals erred in holding that under the doctrine of *res judicata*, the Wolff decision barred the County from regulating the disposal of rubble on Gertz's farm.

II.

A.

Gertz's argument that *res judicata* in the case *sub judice* starts with the Wolff decision. In 1989, Judge Wolff ruled that Gertz was not in contempt of court. In his opinion, he stated:

> Now, I can see where the County's going. The County's saying, you are running a landfill, not farming. That's basically the County's position, is it not?

Following the County's agreement, the court continued:

> Okay. If that is the problem, then they can pass ordinances, requiring any off-site filling, whether it be for farming or not, over two truckloads, or whatever it be, needs a permit. But, they're trying to do it

> in another way, which is not reasonable. Because, at least *in this case*, he's allowed to farm. And, that was an exception that's cut off. *So, if the County wants to stop this practice, it may be a good idea, if that's what they want to do, or to control the practice, is to have some ordinance which would control it. This Consent Agreement does not. It calls for farming.*

(Emphasis added.)

Gertz argues that *res judicata* should be applied to bar the County's counterclaim before Judge Williams in 1992 because it is the same claim decided by Judge Wolff in 1989. He interprets the Wolff decision as a finding that he was not operating a commercial sanitary landfill requiring a permit. He maintains, moreover, that the Consent Agreement allows him to place on his land off-site tree materials for farming. Because his land filling activity has not changed, he argues that the County's counterclaim is but another attempt to force him to apply for a commercial sanitary landfill permit.

He maintains that in the 1989 action, the County argued that he was running a landfill, and Judge Wolff concluded that he was farming. Therefore, the court implicitly found that he was not running a landfill. He maintains that the purpose of the County has always been to regulate his activities as a landfill, that the County's claims arise from the same transaction, and that only the County's legal theory has changed, nothing else.

He argues that the County's two claims are the same based on the same evidence test or the transaction

test of the *Restatement (Second) of Judgments.* He claims the same evidence would sustain the present action and the 1989 action. He also argues that the evidentiary facts in both actions constitute a series of connected transactions. He maintains that the only distinguishing factor between the present litigation and the 1989 action is the County's attempt to use a different ordinance to regulate his land filling activities, i.e., Bill No. 28-90 rather than the grading permit ordinance. He asserts that *res judicata* bars the County from again arguing that his conduct constitutes the operation of a commercial landfill, that he is not farming, and that he must therefore obtain a permit.

B.

[1] The doctrine of *res judicata* bars the litigation of a cause of action or claim after it has already been or could have been decided. *See De Leon v. Slear*, 328 Md. 569, 580, 616 A.2d 380, 385 (1992). The rule of *res judicata* was set forth in *Alvey v. Alvey*, 225 Md. 386, 390, 171 A.2d 92, 94 (1961), as follows:

> a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action, and is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit.

In *DeLeon*, 328 Md. at 580, 616 A.2d at 385, this Court restated the elements of the traditional principle of *res judicata*:

[1] the parties in the present litigation should be the same or in privity with the parties to the earlier case; (2) the second suit must present the same cause of action or claim as the first; and (3) in the first suit, there must have been a valid final judgment on the merits by a court of competent jurisdiction.

[2] The focus of this controversy is on the second element of *res judicata*: whether the claim presented before Judge Williams is the same "claim" or "cause of action" presented to and decided by Judge Wolff. If they are the same, *res judicata* bars the County from proceeding before Judge Williams. In *Kent County Bd. Of Educ. v. Bilbrough*, 309 Md. 487, 499, 525 A.2d 232, 238 (1987), we adopted the transaction test of § 24 of the *Restatement (Second) of Judgments* as the basic test for determining when two claims or causes of action are the same for purposes of *res judicata*. We quoted § 24(2) with approval:

What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Bilbrough, 309 Md. at 498, 525 A.2d at 238. Applying the *Bilbrough* factors, and reviewing the two claims from a transactional analysis approach, we conclude that the claim raised in the second action, the action before Judge Williams, was not the same as the claim decided in the prior adjudication, the action before Judge Wolff. They are separate transactions.

We shall first address whether the facts are related in time, space, origin, or motivation. The conduct complained of by the County occurred at different times. The counterclaim addressed Gertz's failure to obtain a landfill permit following the enactment of the Ordinance in 1990, while the contempt action addressed Gertz's filling activity in 1989 under the Consent Agreement. Both of the County's claims relate to the same space, focusing on the filling activity on Gertz's property in Anne Arundel County. Nevertheless, the County's claims originated from different sources. Significantly, the theory of liability in the instant action did not exist when the earlier suit was litigated; thus, Gertz's argument that the counterclaim is barred because the County merely changed its legal theory is inapposite. Although *res judicata* generally bars a second suit based on a different legal theory applied to the same set of facts previously litigated, that rule does not apply here because it assumes that the second theory of liability existed when the first action was litigated. *See Bilbrough*, 309 Md. at 495-97, 525 A.2d at 236-37. When the contempt action was litigated, the County had no right to proceed against Gertz under the Ordinance because it had not yet been enacted.

In terms of motive, the County's two claims were motivated by different consideration. In the contempt

action, the County sought to enforce the Consent Agreement and to regulate activity related to land grading. It was not an attempt to regulate Gertz's activities as a sanitary landfill requiring a landfill permit. The motive of the County in the instant action, by contrast, was to enjoin Gertz's activities only until such time as he obtained a landfill permit in compliance with the requirements of the Ordinance. The motive of the County in enacting the Ordinance was stated in the findings of fact of Bill No. 28-90; the existing regulation of sanitary landfill operations, particularly rubble landfills, was inadequate, requiring the adoption of interim regulations,[3] effective for one year, to ensure orderly development of sanitary landfills, including rubble landfills. The recital went on to state that this regulation was necessary to protect and promote the health, safety, and welfare of the citizens of Anne Arundel County. Based on these interests, the County filed the counterclaim to enjoin Gertz's land filling activity only until such time as he complied with the new law.

We shall next consider whether the facts form a convenient trial unit. The County's present and prior claims would not have formed a convenient trial unit in the earlier litigation because the County's rights under the Ordinance did not exist until April 23, 1990, and therefore could not have been litigated in the contempt action in

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[3] Section 3 of the Ordinance reads as follows:

> That the provisions of this Ordinance shall be applicable for one year after the effective date of Bill 28-90 and shall expire thereafter without any further action of the County Council.

1989.

Finally, we shall address whether treating the facts as separate trial units conforms to the parties' expectations or business understanding or usage. Certainly the County did not consider the Wolff decision to exempt Gertz from all future regulations relating to sanitary landfills. Gertz could not have expected that the Wolff decision determined that he was not running a sanitary landfill, or that it exempted him from future sanitary landfill regulations. Significantly, Judge Wolff expressly indicated that his decision was not intended to affect the County's ability under its police power to adopt prospective legislation that regulated activity like Gertz's as a sanitary landfill. We find that Judge Wolff only decided that Gertz was farming and did not determine whether he was running a sanitary landfill.

We conclude that Gertz could not have expected the Consent Agreement to exempt him from a sanitary landfill permit requirement enacted pursuant to a legitimate exercise of the governmental power. Furthermore, the counterclaim of the County for injunctive relief to enforce the Ordinance is not the same claim that was litigated in the contempt action. Accordingly, the doctrine of *res judicata* does not bar the County from proceeding before Judge Williams.

III.

The Court of Special Appeals also found that the Duckett decision "became the law of the case," and concluded that as a result, Judge Williams was barred from considering whether the Ordinance applied to Gertz's

activities. We disagree. The order of Judge Duckett was not the law of the case and was subject to revision under Maryland Rule 2-602(a).[4] Thus, Judge Williams was not precluded by the order from applying the provisions of the Ordinance to Gertz.

[3] Maryland Rule 2-602(a) makes clear that an order that does not adjudicate all of the claims in an action, or that adjudicates less than an entire claim, or that adjudicates the liabilities of fewer than all the parties to the action is not a final judgment and may be revised at any time before the entry of a final judgment. *See Rohrbeck v. Rohrbeck*. 318 Md. 28, 44, 566 A.2d 767, 775 (1989) (until there is a final judgment, under Maryland Rule 2-602, all prior ruling remain interlocutory and subject to revision). We have held, moreover, that "[a]s a general principle, one judge of a trial court ruling on a

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[4] Maryland Rule 2-602 provides in pertinent part:

> **(a) Generally.**--Except as provided in section (b) of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, cross-claim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action:
>
> (1) is not a final judgment;
>
> (2) does not terminate the action as to any of the claims or any of the parties; and
>
> (3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.

matter is not bound by the prior ruling in the same case by another judge of the court; the second judge, in his discretion, may ordinarily consider the matter de novo." *State v. Frazier*, 298 Md. 422, 449, 470 A.2d 1269, 1283 (1984).

[4] The Duckett decision falls within the terms of Rule 2-602(a). The order did not address Gertz's claims for breach of contract or violation of § 1893, nor the County's request for authorization to inspect Gertz's property to ensure his compliance with the Consent Agreement. On Gertz's claim for declaratory judgment, the order did not address whether the Ordinance was applied retroactively in violation of his constitutional rights, or whether the requirement that Gertz obtain a permit under the Ordinance and the County's application for an injunction for his failure to do so effected an unconstitutional taking of this property. Judge Duckett also did not reach the question of damages and he did not purport to grant final judgment to Gertz. *See Rohrbeck*, 318 Md. at 41, 566 A.2d at 773. Thus, Judge Williams was free to apply the Ordinance to Gertz.

IV.

[5[Finally, we shall consider whether the actions of the County give rise to a cause of action under 42 U.S.C. § 1983.[5] Judge Williams found that Gertz suffered

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[5] 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or

no constitutional deprivation and was therefore not entitled to damages under § 1983. We agree. The Court of Special Appeals found:

> Based upon the ruling by Judge Duckett, which became the law of the case, that the ordinance was not applicable to the Gertz situation because of Judge Wolff's "farming operation" ruling, we hold that 42 U.S.C. § 1983 does not apply to the matter at bar. Although the County may have attempted to divest the right of Gertz to conduct filling activities on his property for agricultural purposes, that particular statute was ruled not to apply to the Gertz operation.

Although we find that the Ordinance applies to Gertz's land filling activity, we affirm the holding of the intermediate appellate court that Gertz is not entitled to damages under § 1983.

Gertz does not contend that the County lacked the power to enact the Ordinance, nor does he attack the

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> usage, of any State...subjects, or causes to subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

validity of the Ordinance facially. He only argues that, as applied to him, the new sanitary landfill law is unconstitutional. His argument is that, because the farming provision of the Consent Agreement and the Wolff decision concern the same land filling activity regulated under the Ordinance, the County's efforts breached the Agreement, violated his right to substantive due process, and effected a taking of the equivalent of a permit to fill his land with raw tree materials, thus giving rise to a cause of action under 42 U.S.C. § 1983. We disagree.

Gertz does not have a cause of action under § 1983 for a violation of his constitutional rights. He was subject to the Ordinance and failed to obtain a sanitary landfill permit. The actions of the County did not effect an unconstitutional taking of property because the Consent Agreement never entitled Gertz to an exemption from future legislation which was validly enacted under governmental power to regulate all sanitary landfills in Anne Arundel County. We therefore deny Gertz's § 1983 claim.

In sum, we hold that neither the doctrine of *res judicata* nor the Duckett decision barred the application of the Ordinance to the activity of Robert E. Gertz. We also hold that the actions of the County do not give rise to a cause of action under 42 U.S.C. § 1983.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED IN PART, REVERSED IN PART. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO REINSTATE THE JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY.

GERTZ v. ANNE ARUNDEL COUNTY
[339 Md. 261 (1995).]

COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY APPELLANT/CROSS-APPELLEE GERTZ.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 194
September Term, 1993

ROBERT E. GERTZ

V.

ANNE ARUNDEL COUNTY, MARYLAND

Garrity,
Alpert,
Cathell,

JJ.

Per Curiam

Filed: December 8, 1993

Although the present appeal is from the denial of a breach of contract claim brought by Robert E. Gertz (Gertz) against Anne Arundel County (County), the actual dispute revolves around whether a county landfill ordinance passed as "emergency legislation" by the County four months after a 1989 judgment in

favor of Gertz against the County, applied to landfilling operations on the Gertz property.

Prior to the 1989 Judgment, a Consent Agreement,[1] and a subsequent written amendment were entered into between Gertz and the County that allowed Gertz to use off-site organic rubble consisting of raw tree and root material, brush, tree limbs and stumps to fill ravines on his farm for the purpose of attaining pasture land for horses. After passage of the ordinance, however, the County argued that Gertz's land filling activities were equivalent to operating a commercial landfill that the new legislation prohibited. Gertz brought the action at bar against the County for breach of contract and violation of his rights under 42 U.S.C. § 1983 by retroactive legislation. The Circuit Court for Anne Arundel County (Williams, J.) granted Judgment on behalf of the County.

FACTS

Gertz owns property in Anne Arundel County on which he is in the process of establishing a farm to be used as a horse boarding operation. To that end, he has been filling ravines on his property to establish pasture land. Until he could complete the project, the fees he charged others to accept their organic rubble fill served as his primary source of income.

To gain permission for his project, Gertz and

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[1]The "Consent Agreement" was approved by Judge Robert H. Heller, Jr. of the Circuit Court for Anne Arundel County (Civil # 3107030) on August 20, 1985.

the County entered into a Consent Agreement in 1985 that allowed Gertz to fill ravines on his farm with raw tree and root material, brush, tree limbs and stumps or any rubble originating off-site for Gertz's farming and for personal use. The Consent Agreement stated, in pertinent part:

> That [Gertz], except for his and/or occupant's farming and/or personal use, shall not dump, place, dispose, or otherwise store any bulk loads from off-site of raw tree material consisting of root material, brush, tree limbs and stumps or otherwise dispose or store any rubble originating off-site on the property which is the subject of this proceeding, unless otherwise or subsequently specifically permitted by law ... That [Gertz] shall use his best efforts to pursue development and implementation of an agricultural land management practices plan in cooperation with the Anne Arundel Soil Conservation District, which shall include the stabilization of the cited ravine area to prevent soil loss and erosion therefrom ... [T]his Consent order shall be binding on the heirs, assigns and successors in interest of the parties. (Emphasis added).

In 1988, following continued disputes and erosion problems, Gertz and the County agreed to a slight modification to the Consent Agreement to allow Gertz to continue implementing his conservation and "farm plan concerning pasture establishment" and continue to allow only fill "composed of clearing

rubble which is slash, stumps, root material and clean earth." In addition, four feet of compacted clean fill was to be used to cover the "top of all material" to "allow stabilization for future pasture use."

In 1989, the county brought an action for contempt in the Circuit Court for Anne Arundel County against Gertz alleging that his filling activities violated the Consent Agreement. On December 21, 1989, however, the Hon. Martin A. Wolff ruled that Gertz was not in contempt because the filling activities constituted farming activities that had been permitted under the Consent Agreement. That judgment was not appealed by the County.

On April 23, 1990, approximately five years after Gertz had been continuously engaged in the filling activity permitted by the Consent Agreement, the County enacted Bill No. 28-90, "[a]n emergency ordinance," which amended Article 14 and 28 of the Anne Arundel County Code and created new requirements for sanitary landfills. See Anne Arundel Co. Code, Article 14 Environmental Health §4-101 - §4-109; and Article 28 Zoning §§1-101(55B)(57), 11-112(a), 12-242. Specifically, the Code was modified so that the definition of "sanitary landfill" included the planned disposal of "rubble." Art. 14 §4-101(f)(2). Rubble is defined as stumps, brush, roots and topsoil. See, Md. Regs. Code tit. 26 § 26.04.07.11B (1988) (COMAR). These were the materials being used by Gertz, and, as such, if the amendments applied to him, he would be required to obtain a licensing
permit and apply for a special zoning exception. Indeed, Gertz was advised, by letter dated June 4, 1990, that his filling and grading activities were in violation of the new ordinance and that failure to

comply could result in legal action.

Gertz filed a Complaint for Declaratory Judgment seeking to show that Bill 28-90 was invalid as applied to him and, because of the prior 1989 ruling, he was not in violation of the Consent Agreement. The County answered with a Counterclaim for Immediate, Interlocutory, Ex Parte and Permanent Injunctive and Other Relief. Following a hearing, an Interlocutory Injunction was granted.

On August 14, 1990, Gertz filed an Answer to the counterclaim and amended his declaratory judgment complaint to also allege breach of contract, violation of 42 U.S.C. §1983 (1981),[2] and specific performance. On April 4, 1991, Gertz filed a Motion for Summary Judgment. On April 8, the County filed an Amended Counterclaim for

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[2]Forty-two U.S.C. section 1983 provides in pertinent part:

> Civil action for deprivation of rights
>
> > Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects...any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action at law, suit in equity, or other proceeding for redress...

permanent injunction, and on May 28, 1991, the County filed a Motion for Summary Judgment.

The Hon. Warren B. Duckett heard both Motions for Summary Judgment on June 18, 1991, and finding that Bill 28-90 did not apply to Gertz's actions, granted his motion, thereby dissolving the interlocutory injunction. The County filed a Motion to Alter or Amend that was heard by Judge Duckett on September 16, 1991. Two days later, Judge Duckett struck his prior summary judgment ruling leaving both motions still pending. The parties conferred and by letter requested that the court grant summary judgment to one or the other, as they believed that a trial on thee merits was unnecessary.

On February 19, 1992, Judge Duckett again granted Summary Judgment on the declaratory judgment count in favor of Gertz, ordering that "Robert E. Gertz has a vested right in the filling activities permitted in the Consent Agreement ... [and the] County is estopped from enforcing Bill No. 28-90 to the activities of Robert E. Gertz that comply with the Consent Agreement."

Gertz then filed an amended Complaint and sought an increase in damages on his remaining claims on breach of contract and violation of rights under color of law (42 U.S.C., § 1983). In a two-day hearing before the Hon. Bruce C. Williams held on December 9 and 10, 1992, the County argued that liability had not been determined and that Judge Duckett's Order of February 19 merely determined that Gertz had a right to continue the activities authorized by the Consent Agreement and enjoined the County from enforcing Bill 28-90 as to

his filling activities. We believe Judge Williams properly agreed with the County as to the subject of the hearing on the remaining counts and required evidence on both liability and damages.

At the conclusion of Gertz's case, Judge Williams granted the County's Motion for Judgment, ruling that Gertz was not using his property for personal or farming use, as permitted by the Consent Agreement, but instead was operating a commercial landfill, and that there was no proof of a 42 U.S.C. §1983 claim. It was agreed by the parties that at no time during these related actions did Gertz's activities in filling the ravine area change in nature or purpose. On appeal, Gertz brings three issues for our review:

1. Whether Judge Williams was barred from reaching the issue of liability either by the collateral estoppel effect of the February 19, 1992 ruling of Judge Duckett or by the December 21, 1989 decision of Judge Wolff on the grounds of res judicata.

2. Whether the court was correct that no contract existed between the parties.

3. Whether the court was correct that there was no proof of damages under a 42 U.S.C. §1983 claim.

DISCUSSION OF LAW

Res Judicata and Collateral Estoppel

In applying res judicata "[i]f the second suit is between the same parties and is the same cause of action, a judgment in the earlier case on the merits is an absolute bar, not only as to all matters which were litigated in the earlier case, but as to all matters which could have been litigated [res judicata]." MPC, Inc. v. Kenny, 279 Md. 29, 32 (1977)(citations omitted).

The first of the three-pronged test in Maryland is "was the claim in the prior adjudication identical with the one presented in the action in question." Id., 279 Md. at 32-33. On December 21, 1989, the cause of action before Judge Wolff was a contempt of court proceeding brought by the County against Gertz for violation of the Consent Agreement. The County claimed Gertz needed a permit for his landfill operations. The cause of action in the instant proceeding emanated from the declaratory judgment action by Gertz against the County to declare Bill 2890 inapplicable to him because of the Consent Agreement, thereby precluding the County from requiring Gertz to obtain a permit for his landfill operations. Utilizing either the same evidence test, MPC, Inc., 279 Md. at 33, or the same transaction standard adopted from Section 24 of the Second Restatement of Judgments, the claim in both cases is the same. See Deleon v. Slear, 328 Md. 569, 589-90 (1992).

The second prong is whether "there was a valid final judgment on the merits." MPC, Inc., 279 Md. at 32-33. Judge Wolff, relying upon Howard

County v. Carroll, 71 Md. App. 635 (1987), ruled that, under existing law, Gertz's activities in filling his ravine area constituted farming and did not violate the Consent Agreement. At that hearing, it was acknowledged by Judge Wolff that Gertz, as in the Caroll case, had been charging a fee to dump off-site organic fill into his ravine. Judge Wolff stated in dicta, however, that "if the County wants to stop this practice, it may be a good idea, if that's what they want to do, or to control the practice, is to have some ordinance which would control it." The County argues that this dicta limited Judge Wolff's ruling to the case before him. We believe, however, Judge Wolff's decision that Gertz's activities constituted permissible farming under the Consent Agreement was a binding decision on the merits and was not limited by his gratuitous advice to the County. Furthermore, the judgment was final and enrolled without appeal.

The final prong of res judicata is whether "the party against whom the plea is asserted [was] a party ... to the prior adjudication." MPC, Inc., 279 Md. at 32-33. The parties to both cases are identical.

Although the County acknowledged the ruling by Judge Wolf that Gertz's activities constituted a farming operation, it argued to Judge Williams in the matter sub judice that the newly enacted ordinance dealing with sanitary landfills included rubble landfills, such as on the Gertz property, were within the licensing requirements.

This brings us again to the issue of whether Gertz had a vested right to continue the activities permitted under the Consent Agreement, even

after the passage of the new legislation. As previously stated, Judge Duckett had granted Summary Judgment for Gertz, ruling that his activities were that of farming and conservation practices acceptable under the Consent Order and that the land was not being solely used for disposal of rubble and therefore was beyond the ambit of Bill 28-90.

Judge Duckett further determined that Gertz had engaged in filling activities permitted by the Consent Agreement continuously from the date of the Consent Agreement; that Gertz had a vested right in the filling activities permitted in the Consent Agreement; and that the County was estopped from enforcing Bill No. 28-90 to Gertz's activities that fell within the Consent Agreement. Judge Duckett further determined that the filling activities had remained the same since Judge Wolff found that such operation had constituted farming rather than a sanitary landfill "operated solely for the disposal of rubble."

In passing, we note that the County had argued to Judge Duckett that there was no vested right to a use of property that would preclude the legislature from enacting a law that subsequently removed such use. Generally, this may be true,

but, in the instant case, the County had entered into a written agreement with Gertz that did in fact confer a vested right of use. See, Chernick v. Chernick, 327 Md. 470, 478-81 (1992) (consent decrees have attributes of both binding contracts and judicial decrees). As such, we believe that Judge Duckett properly found that Gertz had a vested right to continue activities permitted by the Consent Agreement even after the passage of Bill

28-90. In any event, that particular issue (of whether the ordinance applied) having been decided by Judge Duckeyy should not have been an issue before Judge Williams. See, MPC, Inc., 279 Md. at 35.

Judge Williams had before him only the issues of whether, as a result of the acts by the County, damages properly could be awarded under either theories of breach of contract or 42 U.S.C. § 1983. Contrary to Judge Wolff's ruling, Judge Williams ruled that Gertz's activities constituted operating a commercial landfill for profit rather than farming. The doctrine of res judicata should have been applied to decide Gertz's activities, which undisputedly had not changed since the ruling in 1989 by Judge Wolff.

Damages Under Breach of Contract Theory

As Judge Williams' denial of the damages claim rested on his erroneous finding that Gertz had been engaged in an activity not allowed by the Consent Agreement, we must remand this matter to the circuit court to determine, in light of the prior judgments in the case, whether the County breached its agreement and what damages, if any, to which Gertz may be entitled to recover due to the interruption of his farming project.

Damages Under 42 U.S.C. S 1983 Theory

Based upon the ruling by Judge Duckett, which became the law of the case, that the ordinance was not applicable to the Gertz situation because of Judge Wolff's "farming operation" ruling, we hold that 42 U.S.C. § 1983 does not apply to the matter at bar. Although the County may have attempted to

divest the right of Gertz to conduct filling activities on his property for agricultural purposes, that particular statute was ruled not to apply to the Gertz operation.

JUDGMENT REVERSED;
CASE REMANDED TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY ANNE ARUNDEL COUNTY.

ROBERT E. GERTZ, PLAINTIFF	)	IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY
VS.	)	CASE NO. 3114763
ANNE ARUNDEL COUNTY, ET AL., DEFENDANT	)	

PROCEEDINGS IN OPEN COURT
(VOLUME 2 OF 2)
ON
DECEMBER 10, 1992
BEFORE
THE HONORABLE BRUCE C. WILLIAMS

PRESENT:

JAMES L. MAYER,
COUNSEL FOR PLAINTIFF
CHRISTINE R. SADLER,
COUNSEL FOR PLAINTIFF
ROBERT M. POLLOCK,
COUNSEL FOR DEFENDANT
CHERYL P. BOUDREAU,
COUNSEL FOR DEFENDANT
PATRICIA A. BARTON,
COURTROOM CLERK
KATHLEEN M. HIGGINS,
COURT REPORTER
LOIS E. ROWE,
TRANSCRIPTION ONLY

contract --- what their argument about what contract effectively saying, the County Council may not use --- use --- use its legislative functions to --- to enact new laws which affect Mr. Gertz in --- in this regard. And if they do, they're liable for 1983 damages. I don't think the cases go that far. I don't think the --- this case should go this far and I --- and I would submit there's not a contract and therefore there's no basis for 1983. I just want to make that point at the tail end of it, without getting into all the other matters.

Thank you.

COURT: All right. Well. I think this case, obviously, presents a number of issues, but the main thrust of the plaintiff's claim here is that the County, by obtaining the injunction in July of 1990, somehow violated what is called a Consent Agreement, but I would agree more in the form of a consent decree since it's issued by Judge Heller and it's only read and approved by the parties in this case --- the attorneys for the parties, actually. It really is a consent decree. And I think as such, established a relationship between the parties as a result of that other lawsuit.

The problem, as I see it, is that the County, in obtaining the injunction, was doing so because Mr. Gertz failed to get the licenses required by the newly enacted ordinance, Bill 2890, which required all rubble fills to have a --- a license. And why he didn't get the license, I don't know, but he chose not to, so that caused the injunction to issue. And I think as a result of that, we have Judge Wolff's finding that the prior order of court allowed Mr. Gertz to dump stumps and other raw

tree material on his property as a part of its farming definition.

The problem, as I see it, is that Mr. Gertz wasn't only farming and using this as his personal use. He was running a commercial landfill for profit. He wasn't just trying to fill these ravines to make a pasture for his farmland. He was running a business. And this so-called Consent Agreement never gave him any authority to do that. It specifically says that he's prohibited from dumping, placing or disposing, et cetera, except for his or occupant's farming and/or personal use. That doesn't include commercial landfill operations, which he apparently was running.

So while the County may have had some reason to get upset, they could've issued him a permit, if he'd applied for one, but he never did, so that's why the injunction was issued.

Now regardless of that history, what's the remedy? And I think that the simple answer is the remedy is exactly what's Judge --- what Judge Duckett did in response to that and say that the Consent Agreement gave Mr. Gertz the right to continue to farm and stump --- tree material, roots, brush, tree limbs, stumps whatever, for farming and/or personal use. That's what the agreement said and he said he didn't think it was necessary for him to get a permit to do that, which is probably true, but it still didn't allow a commercial landfill.

So to try to get a recovery against the County for damages because you had your landfill interrupted, your profits removed, I don't think is proper. There is no right to damages for interruption of the business, either loss of business or the cost of a delay or whatever measure you might want to use. I don't think any of it's appropriate

since he's not supposed to net --- be making a profit on this anyway.

And certainly for some possible use of it ss farmland later on down the line when they become pastures is too remote and not a direct result of any injunctive action sought by the County.

As to the damage to the pond, the only element of damage is alleged to be what was caused by the rainfall that occurred right after and during the time of the --- between the ex parte injunction and the temporary injunction, both of which were legal proceedings that were initiated by the County, but not issued by the County. They were issued by the court. If the rains blew out the --- the land and filled in the pond prior to that, that's an act of nature and not something that's caused by the granting of the injunction.

The --- there's no --- there was no testimony that these hundred loads of clean fill that were available to Mr. Gertz could've been placed down in time to build the berm and necessarily finish the project before the rains got there, so all that damage is really not appropriate, in any event. And the cost of removing the silt and other fill that was washed into the pond was something that was taken care of --- offset by commercial profits, so that it --- there wasn't any loss there anyway, as far as the County goes.

So I think all and all --- and there's no proof of federal claim here. I don't think that anything that happened here arises to the lev --- level of the --- that would support any recovery under the federal provisions 1983.

And I see no extraordinary emotional distress damages. I think anytime an injunction's issued against

somebody, you're upset, but that doesn't mean that you get additional damages for emotional distress. And I don't think that's been adequately shown here either, so I will find in favor of the County.

ROBERT E. GERTZ
Plaintiff

v.

COUNTY EXECUTIVE, et al.
Defendants

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY
CASE NO. 3114763

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OPINION & ORDER

A hearing was held on Summary Judgement motions on the 18th day of June 1991. At the conclusion of that hearing, the Court held the matter sub curia. On the 9th day of July, 1991 the Court granted Plaintiff's Motion for Summary Judgement. A hearing was held on a Motion to Alter or Amend Judgement on the 16th day of September, 1991. On the 18th day of September, 1991 the Court ordered that the Order granting Summary Judgement be stricken and the case be set in for a hearing on the merits. Subsequent to this order both parties informed the Court that they did not believe a trial on the merits was necessary. They requested that the Court determine the case on the memorandum already filed.

BACKGROUND

Gertz and the County entered into a Consent Agreement on August 20, 1985, which permits Gertz to dump and store off-site raw tree and root material, brush, tree limbs and stumps only for his farming and personal use. On April 23, 1990, Anne Arundel County Council enacted Bill No. 28-90 which

modifies sections in both Article 14 and 28 in the Anne Arundel County Code. The pertinent modifications affect the definition of "Sanitary Landfill" and the requirements of a "Sanitary Landfill operated solely for the disposal of rubble". "Sanitary Landfill" is defined in Bill. No. 28-90 as "(2) a planned and systematic method for the disposal of rubble." "Rubble" is defined by reference to a COMAR definition for "acceptable wastes" which includes stumps, brush, roots and topsoil. Gertz is using material which the County has defined as "Rubble".

Anne Arundel County argues that Anne Arundel County Bill No. 28-90 restricts Robert E. Gertz's use of fill dirt, brush and stumps to fill in a ravine on his farm. The County claims Gertz is operating a landfill for the disposal of rubble. Gertz claims he is engaged in recognized farming activities permitted under a Consent Agreement.

DISCUSSION

Gertz argues that Bill No. 28-90 violates his due process rights under Maryland Declaration of Rights, Article 24 and the Fourteenth Amendment to the United States Constitution. For Gertz "to have been denied due process, he must have had a vested right to the zoning classification which he lost by operation of law and time." Colwell v. Howard County, 31 Md. App. 8, 354 A.2d 210 (1975). In many of the Maryland cases involving "vested rights", the Court of Appeals cites with approval the following rule;

> The majority rule, which can be synthesized from the multitudinous decisions in this area, may be stated as follows: A landowner will be held to have acquired a vested right to continue construction of a

> building or structure and to initiate and continue a use despite a restriction contained in an ordinance where, prior to the effective date of the ordinance, in reliance upon a permit theretofore validly issued, he has, in good faith, made a substantial change of position in relation to the land, made substantial expenditures, or has incurred substantial obligations.

Ross v. Montgomery County, 252 Md. 497, 506, 250 A.2d 635 (1968). The Court of Appeals subsequently restated the requirements of acquiring a vested right;

> In Maryland it is established that in order to obtain a 'vested right' in the existing zoning use which will be constitutionally protected against a subsequent change in the zoning ordinance prohibiting or limiting that use, the owner must (1) obtain a permit or occupancy certificate where required by the applicable ordinance and (2) must proceed under that permit or certificate to exercise it on the land involved so that the neighborhood may be advised that the land is being devoted to that use.

Richmond Corp. v. Board of County Commissioners for Prince Georges County, 254 Md. 244, 255 A.2d 398 (1969). This Court has reviewed the facts to determine whether these two requirements for acquiring a vested right have been met.

(1)

Anne Arundel County and Gertz entered into a Consent Agreement on August 20, 1985, specifically allowing Gertz, for his farming or personal use, to fill a ravine on his property with roots, brush, tree limbs and stumps. This Agreement was slightly modified in June of 1988 but still permitted Gertz's filling activities. While this Consent Agreement is not a "permit" as that word is typically used in zoning cases, its effect is exactly the same. Both the Consent Agreement and a permit give permission to an individual to engage in a particular activity and they should therefore be treated as being synonymous.

The County argues that Gertz agreed in the Consent Agreement that permission to operate his landfill was conditioned upon compliance with subsequent law. The County cites language from the Agreement which states that Gertz may not fill his ravines with rubble for any use other than farming or personal use unless otherwise or subsequently specifically permitted by law. This condition of compliance with subsequent law refers only to uses other than farming. This language in no way places a condition upon Gertz to comply with subsequent changes in the law if he is engaged in filling for his personal or farming use. The County has not alleged that Gertz is engaged in filling for anything other than his personal or farming use.

(2)

The "known in the neighborhood" test requires the Court to look at the amount of permitted activity engaged in by the landowner. See Mayor

and City Council of Baltimore v. Shapiro, 187 Md. 623, 51 A.2d 273 (1946)(neither the intention to engaqe in the activity nor sporadic activity meet the test of being known in the neighborhood); Calhoun v. County Board of Appeals, 262 Md. 265, 277 A.2d 589 (1970) (occasional or casual use fails to create a vested right).

Bill No. 28-90 was passed on April 23, 1990, almost five years after the Consent Agreement was entered into by the parties. It is undisputed that Gertz has engaged in the filling activities permitted by the Consent Agreement continuously frcnn the date of the Consent Agreement. A letter dated June 4, 1990 from John Peacock of the Environmental Programs Division for Anne Arundel County, to Mr. Gertz, indicates that an inspection of Gertz's property showed Gertz was still engaged in the filling activities as of the date of the letter.

Gertz has engaged in the permitted activity continuously for approximately five years. This amount of continuous activity certainly meets the test of being known in the neighborhood.

Therefore, it is 19th day of February, 1992, by the Anne Arundel County Circuit Court,

ORDERED, Robert E. Gertz has a vested right in the filling activities permitted in the Consent Agreement. It is further

ORDERED, Anne Arundel County is estopped from enforcing Bill No. 28-90 to the activities of Robert E. Gertz that comply with the Consent Agreement

(executed)
Warren B. Duckett, Jr.
Judge

ROBERT E. GERTZ	)	IN THE
	)	CIRCUIT COURT
	)	FOR ANNE
PLAINTIFF	)	ARUNDEL COUNTY
COUNTER-	)	
DEFENDANT	)	
	)	CASE NO. 3114763
VS.	)	
	)	
ANNE ARUNDEL	)	
COUNTY, MARYLAND	)	
	)	
DEFENDANT	)	
COUNTER-	)	
PLAINTIFF	)	

ORDER

The following matter having come before the Court and the Court having taken testimony, orders this 9th day of January, 1991,

ORDERED, that Plaintiff Robert E. Gertz' Motion to Modify the Injunction is granted. The injunction entered on July 27, 1990 is modified to allow Plaintiff Robert E. Gertz to apply for a grading permit from the Anne Arundel County Department of Inspections and Permits to stabilize the property which is the subject matter of this lawsuit. All grading must take place only within the limits of any permit issued by the Department of Inspections and with clean fill dirt.

(executed)
Judge Eugene M. Lerner

cc: Cheryl P. Boudreau, Assistant County Attorney
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Attorney for Defendant/Counter-Plaintiff

Susan S. James Mayer
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Attorney for Plaintiff/Counter-Defendant

ROBERT E. GERTZ	)	IN THE
Plaintiff	)	CIRCUIT COURT
vs.	)	FOR
COUNTY EXECUTIVE	)	ANNE ARUNDEL
and COUNTY COUNCIL	)	COUNTY
OF ANNE ARUNDEL	)	
COUNTY,	)	CASE NO. 3114763
Defendants	)	

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ANNE ARUNDEL COUNTY, MARYLAND
Counter-Plaintiff

vs.

ROBERT E. GERTZ
Counter-Defendant

INTERLOCUTORY INJUNCTION

The Counter-Plaintiff, having filed a Counter-claim and Ex Parte Injunction having been issued on the Counter-claim, and Counter-Defendant having filed a motion to dissolve Ex Parte Injunction, and the matter having come before a Court and the Court having taken testimony and having found the evidence presented warrants the issuance of an Interlocutory Injunction, Orders this 27th day of July, 1990

ORDERED, that Counter-Defendant, Robert E. Gertz is enjoined from accepting fill or permitting the disposal of fill on the property which is the subject matter of this law suit. This Injunction is to remain in effect until a determination on the matter of Counter-Plaintiffs, Counter-Claim; and it is further

ORDERED, that representative of the Anne Arundel County Department of Inspections and Permits have the right to inspect the property, pursuant to previous Orders of this Court and to check for compliance with this Injunction, during daylight hours without prior notice to Counter-Defendant, Robert E. Gertz.

(executed)
Judge Eugene M. Lerner
Circuit Court Judge

cc: Cheryl P. Boudreau
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Heritage Office Complex
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ROBERT E. GERTZ	)	IN THE
Plaintiff	)	CIRCUIT COURT
vs.	)	FOR
COUNTY EXECUTIVE	)	ANNE ARUNDEL
and COUNTY COUNCIL	)	COUNTY
OF ANNE ARUNDEL	)	
COUNTY,	)	CASE NO. 3114763
Defendants	)	

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ANNE ARUNDEL COUNTY, MARYLAND
Counter-Plaintiff

vs.

ROBERT E. GERTZ
Counter-Defendant

EX PARTE INJUNCTION

The Court, having read and reviewed the pleadings and Affidavit filed by Counter-Plaintiff, ANNE ARUNDEL COUNTY, MARYLAND, and having heard counsel for both parties to this case, and having found that there will immediate substantial and irreparable harm to Counter-Plaintiff if an immediate injunction is not issued, it is this 20th day of July, 1990,

ORDERED that Counter-Defendant, ROBERT E. GERTZ, is enjoined for a period of ten (10) days from service of this Order upon him or his counsel from

accepting fill or permitting the disposal of fill on the property which was the subject matter of this lawsuit; provided however that Counter-Defendant may move for hearing on this Ex Parte Injunction with two (2) days notice to Counter-Plaintiff.

_____

Judge

ANNE ARUNDEL COUNTY,	) IN THE
	)
PLAINTIFF	) CIRCUIT COURT
	)
VS	) FOR
	)
ROBERT GERTZ	) ANNE ARUNDEL
	)
DEFENDANT	) COUNTY
	)CASE NO. 3107030

* *

COURT'S OPINION

HEARD IN OPEN COURT BEFORE HON. MARTIN A. WOLFF

December 21, 1989

Present:

Cheryl P. Boudreau, Esq., Assistant County Solicitor

Susan Mayer, Esq., Attorney for Defendant

Nancy Baker, Deputy Clerk

Conchira D. Tuers, Court Reporter

COURT'S OPINION

What we have here is a rather narrow issue, and whether there are good conservation practices or not, it's not the paramount in what the Court has before it. The respondent in this case has a farm,

unbeknownst to the County, they thought he had the whole farm. He doesn't have the whole farm. Part of it has been deeded out. And, back in August of 1985, a Consent Agreement was reached between Anne Arundel County and Mr. Gertz. At that time, he had the entire farm. And the Consent Order, basically there are two paragraphs which are in contention now.

The first says that the defendant accepted..this is paragraph one, accept for his and/or occupant's farming and/or personal use, shall not dump, place, dispose, or otherwise to store any bulk loads from offsite raw materials. And, it goes on.

The other pertinent paragraph is the paragraph four, where he is to use his best efforts to pursue development and implementation of an agricultural hand management practice in cooperation with Anne Arundel County and the Soil Conservation District, which plan shall include the stabilization of the ravine and prevent soil loss and erosion therefrom.

What is happening to this property is not in dispute. Photographs were offered. Testimony was offered. But none of it was contradicted by the defendant. In fact, what is happening is in two areas of main concern, was one, an existing farm road was improved and dirt was moved around. I even think there was some piece of concrete, at one point, testified as part of the base. And, that road was put in. And, the second was the filling certain ravines. I use a plural because I think there is more than one in guestion or more than one area.

It's clear that offsite are materials being

brought in, I guess, some days four to five loads. The maximum, perhaps, I think he said once every couple of months, there may be as many as 20 loads coming in. But, basically, about four loads from certain contractors which are known to the respondent, that he can rely on, that they're not going to dump, as he said, concrete and other things there. And, as I said, it's not in question that the road was improved. So, those are the two areas that we're concerned with.

No matter which way the Court would rule on the case, the road issue is not before the Court, because we find out that that's on son, Dale's property. And, if there's a violation, this agreement runs to any successive owners. So, if the road is in violation, Dale is the one who has to be brought in and the County was not aware of that. They are aware it now. So, if they wish to pursue that matter, that's something that they can do against the son, Dale. But, certainly the respondent before the Court does not own that land, and cannot be held in contempt on that land for its misuse, if in fact, it's misuse.

The key to the case, as I see it, is whether or not this is what we can call farming. Because he is not to bring offsite material in to fill, unless it is for farming use. That being, you can't run a landfill. But, you can use offsite material for farming use and that's from paragraph one. And at first blush, it seemed to me, you know, putting piles of trees and stumps is not farming. To me, that looked like farming, I always thought was where you may plow up land and you put seeds in and you grow and you harvest, and that's what I traditionally thought of farming. I told you all in the beginning, I'm not a

farmer. I have a little plot and I grow, you know, corn, tomatoes and cucumbers and things like that. I'm not a big farmer. A little home garden.

This is not a new question because the Court of Special Appeals in Howard County vs. Carroll had a similar question. The facts in that case are slightly different, but the principles are the same. Out there, in Carroll County. Howard County, Mr. Carroll, who is..also an adjoining county by the same name. Mr. Carroll, Philip Carroll, had some problems and it dealt with a farm where he was filling in an area. And, it was pretty much like this case, because Mr. Allnut there, as opposed to several contractors here, was bringing in organic fill, basically tree stumps and things like that. As a matter of fact, was paying $40 a load, and that was pretty much what the cost was here, so not disproportionate. And, the County said, well, you need certain permits and you have to comply with a section of the Carroll County Code which requires permits for grading and clearing, except things which are excepted, and the excepted activities are agricultural land management practices. And, they never got to a contempt proceeding in that case. That went up on the Declaratory Judgement. You know, what does this mean? It was Mr. Carroll's contention that you could fill in the land of the farm.

And, as I looked at the case, I kind of disagreed. I said, gee, that it looks to me you're not farming, you're filling. But, a rather select panel..I have the highest regard for Chief Judge Gilbert, Bloom, and Karwacki who authored this opinion. Actually, it's Judge Bloom. And, they went through a careful analysis because, you know, what do you

mean? What is farming? What is agriculture? You know, everyone seems to think it's the planting of seeds and the tending to the crop and the harvest. But, they go through an analysis of many States who have interpreted these terms. And, when you talk about cultivation, cultivation does not mean just tilling the land to put the seed in, but also they said encompassed filling in land to make it useable.

That's..you're not producing a crop, but that's part of the method in which a crop is produced.

Facts in that case, the larger area, bringing it in, filling it in, filling it with dirt, and using it for farm land. And Judge Bloom, Karwacki, and Gilbert, agreed that that is a farm practice.

Now, if you look at the case, whether or not they needed a grading permit, in this..the testimony in that, which is similar to that, that it was a farm land. That there were ravines. That people were bringing in fill. The purpose was to create tillable land on the property. The purpose here is to create pasture land for a horse farm and there's no indication that that is not the intention of the Defendant. He said that all along. I mean, this is not something he's come up with today, that he didn't say before, as far as I know. That this is something the family had planned on. They've divided the land up. So, the purpose is to create additional, useable land. He said horses can't go down in a ravine and I'm aware of that. Other people testified, in that case, a farmer named Warfield testified that that's commonly used as a practice. That case, Mr. Tate, the manager of the farm, said that that's a commonly used practice. In this case, the respondent, Mr. Gertz, has a wealth of farming

experience. He said it's an acceptable practice. A neighbor came in and said, yes, this an acceptable practice of filling in.

And, the opposition in that case, was from the District Manager from the Howard County Soll Conservation District, Just like Mr. Wist here. And, he said the reason that this is bad..well, he said, one, that a sediment control ordinance..he said the use, the intended use of the land was not relevant. It was how it was being used then. In other words, you were landfilling and he did not look forward to the ultimate use. That was one thing that was then said. And, also, I believe, that he had a problem, that the bringing in was bad. And, also, perhaps the size. These were some of the reasons that he had set forth. And Judge Bloom said that this word, "agricultural land management practices," even a more broad term in this case, "farming," is not a restrictive word. It doesn't mean putting a seed in the ground and harvesting. It encompasses everything from preparing land, and that could be filling in, all the way through the end.

And, if you note here what Mr. Wist's problem was, he said, you know, there's nothing wrong moving dirt and putting tree fill..putting tree stumps in if you did it on the property. It's the fact that you're bringing it from off the property. Well, if it's good use to do it on the property, how can it be bad if you bring it in from off the property? I don't follow his logic.

Now, I can see where the County's going. The County's saying, you are running a landfill, not farming. That's basically the County's position, is it not?

MS. BOUDREAU: I would agree, Judge. (Continued Opinion)

Okay. If that is the problem, then they can pass ordinances, requiring any off-site filling, whether it be for farming or not, over two truckloads, or whatever it be, needs a permit. But, they're trying to do it in another way, which is not reasonable. Because, at least in this case, he's allowed to farm. And, that was an exception that's cut off. So, if the County wants to stop this practice, it may be a good idea, if that's what they want to do, or to control the practice, is to have some ordinance which would control it. This Consent Agreement does not. It calls for farming.

Now, the bottom line is, in this case, if the real purpose is to control the use of land, that is to have the land done so there's not erosion, so there's good practices. We know that this land has made, part of it, has made fine pasture land. So it's resulting that way. And, we also know, even by the County's own experts, there's no runoff water. There is not silt going on other lands. There is no erosion problem. So, the way he's doing it is perfectly acceptable. Perhaps, if he was not doing it in an acceptable way, and was polluting other people's lands, and there was runoff soil and all, that there may be another way that you could come in.

But, at this point of the case, he has an exemption for farming. And, under Howard County vs. Carroll and under the testimony I have, I believe this to be farming. And, I have nothing to the contrary. It's not been brought to my attention that there's any other regulation that controls this. We're strictly under the Consent Order. Now, there may be mechanisms in place in the County

that can control this. I don't know. That's not before me. If there is not, there are ways that you can handle it.

But, he is not in violation of the Consent Order, number one, because it's farming. And, as to the fourth paragraph, he was to get a plan and implement it to try and stablllze and prevent erosion. He did get a plan and he did work with it. Now, they backed off at the very end, the Soil Conservation Dlstrlct, and there's no animosity. I mean, your witness, Mr. Wist, is a friend of Mr. Gertz. He kept calling him by first name and all. They may have a disagreement as to how it's being done. But, even he said, there is no runoff.
There's no misues of the land. And, he followed the plan, as far as he was concerned, up to a point. He disagreed with, I believe, the road area. He thought that was improper and he also disagreed with the way the land was being filled. But, I don't find that to be proper under the holding in Howard County vs. Carroll.

So, I am going to find that Mr. Gertz is not in contempt of court. And, I guess, probably, we should..no, we don't even need an order in that. The hearing sheet would be sufficient. And, I don't know where the next step lies. But, as far as this case is concerned, that he is excused at this time.

MS. BOUDREAU: Thank you, Your Honor.
MS. MAYER: Thank you, Your Honor.
MR. GERTZ: Thank you, Your Honor.

COUNTY COUNCIL OF ANNE ARUNDEL COUNTY, MARYLAND

Legislative Session 1990, Legislative Day No. 7

Bill No. 28-90

Introduced by Mrs. Clagett, Chairman
and The Entire Council
By the County Council, April 2, 1990

Introduced and first read on April 2, 1990
ublic Hearing set for and held on April 18, 1990

By Order: Judy C. Holmes, Administrative Officer

A BILL ENTITLED

AN EMERGENCY ORDINANCE concerning: Zoning and Environmental Health Applications for Sanitary Landfills, including Rubble Landfills

FOR the purpose of providing uncodified interim regulations Concerning permits and applications for special exceptions for sanitary landfill operations, including rubble landfills.

FINDINGS OF FACT

During the past several years, it has become increasingly apparent to the County Council that existing regulation of sanitary landfill operations, particularly rubble fills is inadequate. Numerous complaints have been received about the inadequacy of standards for review, and the confusion between the Environmental Health and Zoning Articles of the County Code.

On February 20, 1990, a meeting composed of

members of the industry anti citizen groups, assisted by County staff, met and began a review of problems with the existing regulation of sanitary landfills, including rubble landfills. As a result of this meeting, a committee has been formed and is studying resolutions to the problems in this area.

The study undertaken by this group will be on-going and will result in various recommendations, including proposed legislation. However, in the meantime, the County Council finds that it is necessary to adopt interim regulations to be effective for one year that will insure orderly development of sanitary landfills, including rubble landfills, while the study is going on. These regulations will supersede existing applicable sections of the Environmental Health and Zoning Articles of the County Code as shown in this Bill only for this period of time, and that will help ensure the orderly development of sanitary 'landfills, including rubble landfills, in the County. The County Council also finds that these ~ uncodified interim regulations upon sanitary landfills, including rubble fills, am in the best interest of the residents of Anne Arundel County and am intended to protect and promote the health, safety, and welfare of the citizens of the County.

EXPLANATION: CAPITALS indicate new matter temporarily modifying and superseding existing law.

SECTION 1. *Be it enacted by the County Council of Anne Arundel County, Maryland*, that Section(s) of the Anne Arundel County Code (1985, as amended) are temporarily modified and superseded as follows:

1. *In Article 14 Environmental Health the following shall apply as shown:*

(A) Add § 4-101(e-l) to read as follows:

"(E-1) "RUBBLE" MEANS "ACCEPTABLE WASTES" AS STATED IN COMAR 26.04.07.13B ."

(B) *Substitute the following for existing § 4-101 (f):*

"(f) "Sanitary landfill" means:

(1) a planned and systematic method of refuse disposal by which waste material is placed in the earth in layers, then compacted and covered with earth or other approved cover material at the end of each day's operation; OR

(2) A PLANNED AND SYSTEMATIC METHOD FOR THE DISPOSAL OF RUBBLE

(C) *Substitute the following for the first sentence of existing §4-105(b):*

"(b) Each sanitary landfill shall consist of a planned and systematic method of refuse disposal whereby the waste material is placed so that it is thoroughly compacted and covered at the end of each day's operation with at least six inches of compacted natural soil, earth, or other nonflammable, nonputrescible material acceptable to the County Health Officer, OR FOR THE DISPOSAL OF RUBBLE."

(D) *Add the following at the end of existing §4-107(d):*

"AT THE DISCRETION OF THE DEPARTMENT OF INSPECTIONS AND PERMITS, THE PROVISIONS OF THIS SUBSECTION MAY BE SATISFIED IF THE APPLICANT HAS PROVIDED THE STATE DEPARTMENT OF THE ENVIRONMENT WITH A BOND IN AN

AMOUNT NO LESS THAN THAT REQUIRED BY THIS SECTION AS A CONDITION FOR THE ISSUANCE OF A PERMIT BY THE STATE."

(E) *Substitute the following for existing §§4-107 (e) and (f):*

"(E) A PERMIT EXPIRES CONCURRENTLY WITH THE EXPIRATION OF A PERMIT ISSUED BY THE STATE DEPARTMENT OF THE ENVIRONMENT.

(F) FOR A SANITARY LANDFILL THAT IS OPERATED SOLELY FOR THE DISPOSAL OF RUBBLE, THE FEE FOR A PERMIT OR RENEWAL OF A PERMIT SHALL BE SUFFICIENT TO COVER THE COST OF PROVIDING AN INSPECTOR TO INSPECT THE LANDHLL AT LEAST ONCE A DAY PLUS ATTENDANT OVERHEAD COSTS, AS DETERMINED BY THE DEPARTMENT OF INSPECTIONS AND PERMITS."

(F) *Delete §§4-106 and 4-108(b) in their entirety.*

(G) *Add §§4-109(s), (t), and (u) to read as follows:*

"(S) FOR A SANITARY LANDFILL THAT IS OPERATED SOLELY FOR THE DISPOSAL OF RUBBLE:

(1) THE HOURS OF OPERATION SHALL BE LIMITED TO 7:00 A.M. TO 5:00 P.M., MONDAY THROUGH FRIDAY;

(2) A WHEEL WASHER SHALL BE AVAILABLE DURING ANY TIME OF OPERATION AND SHALL BE USED ON ALL VEHICLES

LEAVING THE LANDFILL: AND

(3) COUNTY INSPECTORS SHALL INSPECT THE OPERATION AT LEAST ONCE DAILY DURING NORMAL HOURS OF OPERATION AND AT ANY OTHER TIME, IF THE INSPECTOR DEEMS IT NECESSARY."

(H) *Add §4-109.1 to read as follows:*

"4-109.1. STOP-WORK ORDER.

(A) WHENEVER A VIOLATION OF THIS TITLE IS FOUND ON ANY PROPERTY, WHETHER OR NOT A PERMIT HAS BEEN ISSUED, THE DEPARTMENT OF INSPECTIONS AND PERMITS MAY:

(1) PLACE A STOP-WORK ORDER ON THE PROPERTY; AND

(2) ISSUE A STOP-WORK ORDER TO ON-SITE PERSONNEL.

(B) WITHIN SEVEN DAYS AFTER A STOP-WORK ORDER IS PLACED OR ISSUED AS SET FORTH IN SUBSECTION (A) OF THIS SECTION, A COPY OF THE ORDER SHALL BE SENT BY CERTIFIED MAIL TO THE PERMITEE, IF ANY, AND TO THE OWNER OF THE PROPERTY, AS LISTED AMONG THE TAX RECORDS OF THE COUNTY.

(C) FAILURE TO COMPLY WITH THE PROVISIONS OF A STOP-WORK ORDER IS A VIOLATION OF THIS TITLE."

II. In Article 28 Zoning the following shall apply as shown:

(A) Substitute the following for existing §§1-101(55B) and (57):

"(55B) "RUBBLE" MEANS "ACCEPTABLE WASTES" AS STATED IN COMAR 26.04.07.13B."

"(57) "Sanitary landfill" means:

(I) a planned and systematic method of refuse disposal in which waste material is placed in the earth in layers, then compacted and covered with earth or other approved cover material at the end of each day of operation; OR

(II) A PLANNED AND SYSTEMATIC METHOD FOR THE DISPOSAL OF RUBBLE."

(B) Substitute the following for existing §11-112(a):

"(A) THE APPROVAL OF A REZONING OR THE GRANT OF A SPECIAL EXCEPTION OR VARIANCE MAY BE RESCINDED, SUSPENDED, OR MODIFIED BY THE ADMINISTRATIVE HEARING OFFICER ON MOTION OF THE COUNTY, AN AGGRIEVED PARTY, OR THE OFFICER'S OWN INITIATIVE IF:

(1) THE MOTION CONTAINS SUFFICIENT FACTS AND EVIDENCE MADE UNDER OATH FOR THE OFFICER TO FIND THAT THE MOVING PARTY AT A HEARING WOULD BE ABLE TO MAKE A *PRIMA FACIE* SHOWING THAT WOULD PERMIT THE OFFICER TO MAKE A FINDING REQUIRED UNDER SUBSECTION (A)(2) OF THIS

SECTION; AND

(2) THE OFFICER FINDS AFTER A HEARING THAT:

(I) THE APPROVAL OR GRANT IS BASED ON A FRAUDULENT MISREPRESENTATION OF MATERIAL INFORMATION STATED IN THE APPLICATION, TESTIMONY, SITE PLANS, OR OTHER SUPPORTING DOCUMENTS; OR

(II) THE USE OF THE PROPERTY MATERIAL DEVIATES FROM THE APPROVED SITE PLAN OR ZONING CONDITIONS IMPOSED."

(C) Substitute the following for existing §12-242:

"12-242. Sanitary landfills.

(A) (1) A sanitary landfill operated by the County OTHER, THAN A SANITARY LANDFILL OPERATED SOLELY FOR THE DISPOSAL OF RUBBLE is permitted in an RA, DD, or W3 District, provided:

(i) the minimum land area for the operation is at least 100 acres

(ii) the applicant presents written evidence signed by the Health Officer that the proposed operadon is in compliance with Article 14, Title 4 of this Code;

(iii) the facility is surrounded by fencing and screening that is at least
six feet high;

(iv) the operation does not encroach into the

natural 100-year floodplain of a stream, tributary area, creek, river, or natural watercoune;

(v) plans and materials are submitted to show:

1. all existing and finished grades;

2. the general vicinity of fill collection;

3. provisions for grading Fill on a scheduled basis;

4. the time of completion of the proposed fill

5. the proposed future use of the property; and

6. computation of floodplain area;

(vi) only waste generated within the boundaries of the County is accepted as Fill material;

(vii) on completion of the operation, the property is subject to a recreation or open space easement by the County;,

(viii) no building pennit is issued for any structure not to be used for recreational purposes; and

(ix) the operation does not accept hazardous waste, including oil products and pathogenic or incendiary material, as fill.

(2) The City of Annapolis may operate its existing landfill on two contiguous parcels of ground in the Second Assessment District of the County. Those parcels were acquired by deeds that are recorded among the land records of the County at Liber 1413, page 576, and Liber

(3) New sanitary landfills or disposal facilities and the expansion of existing facilities are not permitted in the critical area unless an environmentally acceptable alternative does not exist outside the critical area and these activities or facilities are needed to correct an existing water quality or wastewater management problem.

(B) A SANITARY LANDFILL OPERATED SOLELY FOR THE DISPOSAL OF RUBBLE IS PERMITTED IN AN RA,DD, OR W3 DISTRICT, PROVIDED:

(1) THE LAND AREA FOR THE OPERATIONS IS AT LEAST 100 ACRES;

(2) THE FACILITY IS SURROUNDED BY FENCING AND SCREENING THAT IS AT LEAST SIX FEET HIGH;

(3) THE OPERATION DOES NOT ENCROACH INTO THE NATURAL 100- YEAR FLOODPLAIN OF A STREAM, TRIBUTARY AREA, CREEK, RIVER, OR NATURAL WATERCOURSE;

(4) PLAINS AND MATERIALS ARE SUBMITTED TO SHOW:

(I) ALL EXISTING AND FINISHED GRADES;

(II) THE GENERAL VICINITY OF ALL COLLECTION;

(III) PROVISIONS FOR GRADING FILL ON A SCHEDULED BASIS;

(IV) THE TIME OF COMPLETION OF THE

PROPOSED FILL;

(V) THE PROPOSED FUTURE USE OF THE PROPERTY; AND

(VI) COMPUTATION OF FLOODPLAIN AREA

(5) ON COMPLETION OF THE OPERATION, THE PROPERTY IS SUBJECT TO A RECREATION OR OPEN SPACE EASEMENT BY THE COUNTY;

(6) A BUILDING PERMIT MAY BE ISSUED ONLY FOR A STRUCTURE THAT IS TO BE USED FOR RECREATIONAL PURPOSES, EXCEPT A TEMPORARY BUILDING THAT IS NECESSARY FOR THE OPERATION OF THE LANDFILL;

(7) THE OPERATION DOES NOT ACCEPT HAZARDOUS WASTE, INCLUDING OIL PRODUCTS AND PATHOGENIC OR INCENDIARY MATERIAL, AS FILL:

(8) ANY AREA USED TO DEPOSIT REFUSE IS LOCATED AT LEAST 1,000 FEET FROM ANY LAWFULLY PERMITTED RESIDENTIAL, NSTITUTIONAL, OR INDUSTRIAL BUILDING;

(9) ANY AREA USED TO DEPOSIT REFUSE IS LOCATED AT LEAST 100 FEET FROM A PUBLIC ROADWAY OR A NEIGHBORING PROPERTY;

(10) COMMENTS ARE RECEIVED FROM THE FIRE MARSHAL, THE HEALTH OFFICER, AND DEPARTMENT OF PUBLIC WORKS THAT EACH OF THEM HAS NO OBJECTION TO THE SPECIAL EXCEPTION;

(11) THE LAND AREA FOR THE OPERATION IS NOT IN THE CRITICAL AREA:

(12) THE HOURS OF OPERATION ARE LIMITED TO 7:00 A.M. TO 5:00 P.M. MONDAY THROUGH FRIDAY;

(13) THE APPLICANT PROVES THAT THERE IS A DEMONSTRATED NEED FOR A RUBBLE LANDFILL IN THE GEOGRAPHIC AREA OF THE COUNTY WHERE IT IS LOCATED;

(14) THE APPLICANT PROVES THAT THERE WILL NOT BE A MATERIAL NEGATIVE IMPACT ON THE ENVIRONMENT AND, INSOFAR AS POSSIBLE, THERE WILL BE AN ENVIRONMENTAL BENEFIT IF THE SPECIAL EXCEPTION IS GRANTED;

(15) A WHEEL WASHER IS AVAILABLE DURING ALL TIMES OF OPERATION AND IS USED ON ALL VEHICLES LEAVING THE LANDFILL; AND

(16) COUNTY INSPECTORS SHALL INSPECT THE OPERATION AT LEAST ONCE DAILY DURING NORMAL HOURS OF OPERATION AND AT ANY OTHER TIME, IF THE INSPECTOR DEEMS IT NECESSARY."

SECTION 2. *And be it further enacted*, That special exception criteria numbered (1) through (16) in subsection (B) of Section 1, Subsection II(C) of Bill 28-90 shall apply only
to applications for special exceptions for sanitary landfills made on or after April 2, 1990.

SECTION 3. *And be it further enacted*, That the

provisions of this Ordinance shall be applicable for one year after the effective date of Bill 28-90 and shall expire thereafter without any further action of the County Council.

SECTION 4. *And be it further enacted*, That this Ordinance is hereby declared to be an emergency ordinance and necessary for the immediate preservation of the public peace, health, safety, welfare, and property, and being passed by the affirmative vote of five members of the County Council, the same shall take effect from the date it becomes law.

READ AND PASSED this 18th day of April, 1990.

By Order

(executed)
Judy C. Holmes
Administrative Officer

PRESENTED to the County Executive for his approval this 20th day of April, 1990.

(executed)
Judy C. Holmes
Administrative Officer

APPROVED AND ENACTED: 4/23/90

(executed)

C. James Lightnizer
County Executive

I HEREBY CERTIFY THAT THIS IS A TRUE

AND CORRECT COPY OF BILL NO. 28-90, THE ORIGINAL OF WHICH IS RETAINED IN THE FILES OF THE COUNTY COUNCIL.

(executed)
Judy C. Holmes
Administrative Officer

ANNE ARUNDEL COUNTY, MARYLAND Plaintiff	) IN THE) CIRCUIT) COURT FOR
V.	) ANNE ARUNDEL) COUNTY
ROBERT E. GERTZ Defendant	) CASE NO. 3107030

CONSENT AGREEMENT

The Plaintiff, Anne Arundel County, Maryland, having filed a Complaint, wherein it complained that Defendant was engaged in unpermitted grading and filling on certain property near the intersection of St. Stephens Church Road and

Chesterfield Road in Anne Arundel County (the "Subject Property"), and the Defendant having answered, denying liability and claiming an agricultural exemption, but the parties nevertheless being desirous of resolving the differences between them and agreed as to the form of relief to be granted, it is this 20th day of 1985, by the Circuit Court for Anne Arundel County, Maryland, ORDERED, ADJUDGED AND DECREED as follows:

1. That the Defendant, except for his and/or occupant's farming and/or personal use, shall not dump, place, dispose, or other-wise store any bulk loads from off-site of raw tree material consisting of root material, brush, tree limbs and stumps or otherwise dispose or store any rubble originating off-site on the property which is the subject of this

proceeding, unless otherwise or subsequently specifically permitted by law.

2. That the Defendant shall not use the Property, or knowingly permit the same to be used for unpermitted Junk, salvage or waste disposal.

3. That the Defendant may retain on the Property all soil, rock, root material, brush, tree limbs, stumps and all other nonhazardous substances, if any, which were received on the Property prior to institution of this suit.

4. That Defendant shall use his best efforts to pursue development and implementation of an agricultural land management practices plan in cooperation with the Anne Arundel Soil Conservation District, which plan shall include the stabilization of the cited ravine area to prevent soil los~ and erosion therefrom.

5. That in the event the Defendant shall exceed the scope of an a~proved agricultural land management practices plan in a manner prohibited by the applicable State and County Laws or ordinances or should the approved agricultural land management practices plan for t:~e subject site suspended, revoked or rendered void, unless such plan is otherwise modified or revised, then Defendant shall, to the extent required by law, apply for all necessary permits before undertaking any further development of the subject property.

6. That any and all inspections of the subject property shall be as provided by normal process of law.

7. That this Consent Order shall be binding on the heirs, assigns and successors in interest of the parties.

8. That the Defendant shall pay open court costs in this action.

(executed)
JUDGE, CIRCUIT
COURT FOR ANNE
ARUNDEL COUNTY

READ AND APPROVED:

(executed)
Adrian G. Teel
Anne Arundel County
Director of Administration

(executed)
Essom V. Ricks, Jr.
Attorney for Plaintiff

(executed)
John E. Griffith, Jr.
Attorney for Defendant

STATE OF MARYLAND, Anne Arundel County. Sct:
I hereby certify that the foregoing is a true copy of decree of Court passed in the above entitled case in the Circuit Court for Anne Arundel County.

In Testimony Whereof I hereby set my hand and affixed the seal

for Anne Arundel County the 20th

ANNE ARUNDEL COUNTY, MARYLAND
OFFICE OF LAW
P.O. BOX 1831
ANNAPOLIS, MARYLAND 21404
ANNAPOLIS (301) 280-1316
BALTIMORE (301) 974-6750 X 1316
WASHINGTON (301) 970-8250 X 1316
TELECOPIER (301) 280-1799 X 1316

COUNTY SOLICITOR
Stephen R. Beard

DEPUTY COUNTY SOLICITORS
David S. Bliden
David A. Plymyer

SENIOR ASSISTANT
COUNTY SOLICITOR
Robert M. Pollock

ASSISTANT COUNTY SOLICITORS
Patricia A. Logan
Stephen M. LeGendre
Catherine Durkan
Jamie B. Baer
Donald H. Spence, Jr.
Michele A. Dane
Gail K. Thuman
Karen Lee Cook
John K. Gardner

June 7, 1988

Susan S. James
8293 Main Street
Ellicott City, Maryland 21043

Re: Robert E. Gertz

Dear Susan:

The changes penned in and initialed by Mr. Gertz to the Wist letter and the Jonas memorandum are acceptable to both the County and Jim Wist. I would like to add two further conditions to the understanding which, if acceptable to you, can be incorporated into our entire agreement pursuant to paragraph four of the August 20, 1985, Consent Agreement. Those are as follows:

1. Twenty-four hours prior to initiating the filling of the ravine, Mr. Gertz will give the County notice that he is proceeding with the project.

2. Mr. Gertz will permit Mr. Damon Cogar, a grading supervisor with the Anne Arundel County Department of Inspections and Permits to inspect the site periodically to insure the project is being performed in accordance with the agreed upon plan. Should Mr. Cogar leave County employment or be otherwise unable to inspect the property, another grading supervisor shall be permitted to inspect the site periodically.

I have provided a signature line for you below to approve and agree to these conditions. I have executed the other agreements but their operation is contingent upon your agreement to the conditions listed above and your execution of the approval below.

Please feel free to contact me if you wish to discuss this matter further.

Very truly yours,

(executed)
Donald H. Spence, Jr.
Assistant County Solicitor

DHS:ddt
Attachment
c.c. Leroy Jonas, Department of Inspections & Permits
Damon Cogar, Department of Inspections & Permits

Read and Agreed to June 10th, 1988.

(executed)
Susan James, Attorney for Robert E. Gertz

Law Offices of
JAMES L. MAYER

8293 Main Street
Ellicott City, MD 21043
(301) 465-6060

Susan S. James
Edward Benjamin Hall

Donald Hart Spence, Jr., Esq.
Arundel Center
44 Calvert Street
P.0. Box 1831
Annapolis, MD 21404

Re: Robert E. Gertz

May 18, 1988

Dear Don:

Enclosed please find the original documents I received from the County through Karen Cook on May 2, 1988, with the changes we discussed on May 17th penned in and initialed by Mr. Gertz. On the second page of Mr. Wist's letter, I have typed in signatory lines and a date line. Mr. Gertz and I have signed that page and I have signed page 3 with Mr. Gertz having initialed changes above. This five page document represents the fulfillment of paragraph 4 of the August 20, 1985 Consent Agreement between Mr. Gertz and Anne Arundel County. Mr. Gertz has agreed to implement the plan specified in this five page document. In return, the County will allow Mr. Gertz to finish filling in the ravine on his property pursuant

to the terms in the 5 page document.

Mr. Gertz is anxious to finally complete his ranch/pond project, so please let me know immediately if there are any problems.

Thank you in advance.

Yours very truly,

(executed)
Susan S. James

cc: Bob Gertz

United States Department of Agriculture
Soil Conservation Service
211 Chinquapin Round Road
Annapolis, MD 21401
263-6834

January 11, 1988

Mr. Don Spence
Assistant County Solicitor
Office of Law
The Arundel Center
Calvert Street, P.O. Box 1831
Annapolis, MD 21404

Dear Mr. Spence:

Subject: Bob Gertz's Conservation Plan - Per your request, the following comments, plus adjoining topo sheets with drawings, have been prepared. The rubble fill items, if followed, will allow Mr. Gertz to continue implementing his farm plan concerning pasture establishment. The pond is already a part of his farm plan; initial construction has started with completion hopefully by the first of May.

1. Rubble Fill

a. 4' minimum compacted clean fill on top of all material will allow stabilization for future pasture use.

b. Top of fill at downstream end will reach approximately elev. 85 as shown on County topo.

c. Fill will extend back into ravine

approximately 700' at approximately 2.5% slope.

d. At downstream end of fill, a vegetated backslope will be established at a 3:1 minimum compacted slope with an approximate maximum 22' height.

e. A diversion will be built on top of the fill approximately 150' upstream from the downstream end of the fill; the diversion will be almost 300' long and constructed on a 1% grade.

f. Riprap on filter cloth will be added from the outlet of the diversion down the existing swale to the center of the channel.

g. Gravel and filter cloth will be placed in the channel prior to adding any more rubble, the gravel extending through the fill to help carry surface water and spring flows.

2. Pond

a. Will be installed as a multi-purpose recreation-wildlife and sediment basin.

b. Will be built according to USDA-SCS standards and specifications with construction supervision and as-built completed by SCS.

c. The pond and proposed pasture use are part of the conservation plan.

Sincerely,

James W. Wist Jr.
District Conservationist

JWW:dg

cc: Robert E. Gertz

APPROVED AND AGREED TO THIS 6th DAY OF JUNE, 1988

(executed)
ROBERT E. GERTZ

(executed)
SUSAN S. JAMES, ESQUIRE
Attorney for Robert E. Gertz

See letter dated 6/1/88 attached
JAMES W. WIST, JR.

(executed contingent upon approval of letter to Jones dated 6/7/88 attached)
DONALD H. SPENCE, JR., ESQUIRE
Attorney for Anne Arundel County

ANNE ARUNDEL COUNTY
Annapolis, Maryland

INTER-OFFICE CORRESPONDENCE

April 28, 1988

TO: Donald H. Spence, Jr., Assistant County Solicitor

FROM: L. Leroy Jonas, Jr., Assistant Director,
Inspections and Permits

RE: Gertz property St. Stephens Church Road

I have reviewed Mr. Wist's plan and written description for restoration activities necessary to bring the Gertz site into compliance. This plan appears adequate to address erosion problems at the site and is acceptable with the following conditions:

1. No more than approximately 700 linear feet of the fill should be allowed with the toe ending as shown on the approved plans.

2. A final fill slope is shown to be 22 feet in height. This slope will require a total of 66 feet horizontally and should be included within the 700 feet of fill.

3. The pond must be constructed prior to additional work in the ravine area to provide adequate sediment control.

4. James W. Wist, Jr., of the Soil Conservation District or one of his designated representatives, should inspect the site periodically to determine that lengths of slopes an elevations of fill correspond to the approved plan.

5. Fill will only be composed of clearing rubble which is slash, stumps, root mat and clean earth.

Your cooperation in this matter is appreciated.

LLJ/lb

CC: Paul Radauskas, Director, Inspections and Permits
Raymond Riggin, Acting Chief, Environmental Programs Division
Chron/LLJ
File

(executed by Susan S. James,
Attorney for Robert E. Gertz

(executed by Donald H. Spence
contingent upon your approval
of letter _____

United States Department of Agriculture
Soil Conservation Service
211 Chinquapin Round Road
Annapolis, MD 21401
263-6834

June 1, 1988

Mr. Donald H. Spence, Jr.
Assistant County Solicitor
Arundel Center
44 Calvert Street
P.O. Box 1831
Annapolis, MD 21404

Dear Mr. Spence:

Subject: Robert E. Gertz

I have received a copy of your memo to Leroy Jonas and myself dated May 26, 1988.

The changes as presented are acceptable to me.

Sincerely,

(executed)
James W. Wist
District Conservationist
Annapolis Field Office

JWW:csc
cc: R. E. Gertz

ANNE ARUNDEL COUNTY, MARYLAND
Heritage Office Complex
P.O. Box 2700
Annapolis, Maryland 21404
(301) 222-7793

DEPARTMENT OF INSPECTIONS AND PERMITS

June 4, 1990

CERTIFIED MAIL: P-146 809 799

Mr. Robert E. Gertz
1211 St. Stephens Church Road
Crownsville, Maryland 21032

RE: 1211 St. Stephens Church Road, Crownsville

Dear Mr. Gertz:

On April 23, 1990, the Anne Arundel County Council enacted Bill 28-90 that requires the licensure of rubble landfills. Please find enclosed a copy of that bill for your reference. A recent inspection of your property indicates that you are using the property at St. Stephens Church Road for a rubble landfill. Accordingly, it is necessary that you obtain a license from Anne Arundel County to continue this work.

A copy of the application for a permit to operate a sanitary landfill that is operated solely for the disposal of rubble is also enclosed. Please complete the application and return it to this office within thirty days. Your failure to submit this application within the time outlined above may result in legal action. Please feel free to call me at 222-7779 if you should have any questions.

Very truly yours,

John Peacock, Chief
Environmental Programs Division

Enclosures

JP/kld
cc: Ray Riggin, Chief, Erosion Control Division
File-Rubble Landfill
Chron

EXHIBIT